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IN THE

Supreme Court of the United States

Leshia Donaldson, et al.,

Petitioners,

v.

Leon Lott, Richland County Sheriff, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve the conflict between the Fourth Circuit and three other circuits over whether *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), clearly established for purposes of qualified immunity that the Fourth Amendment forbids the use of "all persons" warrants in the absence of individualized probable cause?

2. Should this Court grant certiorari to resolve the conflict among at least nine circuits over the relevance of out-of-circuit precedent in the determination whether a constitutional right is clearly established?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Latanya Owens, Tiffeny Owens, and William Clayton. The following parties appeared below and are not petitioners here: Destiny Owens and Gregory Owens. The following parties appeared below and are respondents here: Geraldo Maldonado, Jane Doe, and Richard Doe, Richland County Deputy Sheriffs.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Leshia Donaldson, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, Pet. App. 1a – 18a, is published at 372 F.3d 267. The opinion of the district court, Pet. App. 19a – 44a, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2004. Chief Justice Rehnquist subsequently extended the time to file this petition to and including October 13, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

STATEMENT

This case presents important questions regarding an investigatory tool that, although frequently employed, is a stark violation of the Fourth Amendment. On the basis of an "all persons" warrant, respondent police officials searched petitioners without any reason – much less probable cause – to believe that any of them had engaged in criminal activity. Petitioners then brought this action under 42 U.S.C. 1983. The Fourth Circuit held that the searches were unconstitutional. But it nonetheless held that respondents were entitled to qualified immunity on the ground that petitioners' Fourth Amendment right to be free from such an "all persons" search had not previously been "clearly established."

Certiorari should be granted to review that judgment and to bring needed uniformity to the lower courts' treatment of cases involving "all persons" searches. The Fourth Circuit's decision indisputably conflicts with the Ninth Circuit's holding on indistinguishable facts that officers are not entitled to qualified immunity. The Ninth Circuit held that a search pursuant to such an "all persons" warrant was not merely unconstitutional, but was so obviously controlled by this Court's decision in *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), that civil liability attached under Section 1983. Two other circuits have similarly relied on *Ybarra* to deny qualified immunity to officers who conducted "all persons" searches without individualized probable cause. In deciding this case, the Court would also resolve a long-standing conflict in the lower courts over the test to apply in deciding the constitutionality of "all persons" searches. Finally, this case offers the Court an ideal vehicle to resolve a fundamental question in qualified immunity law that has split the circuits:

what role does out-of-circuit authority play in determining whether the law is "clearly established"?

1. In *Ybarra* v. *Illinois*, agents of the Illinois Bureau of Investigations obtained a warrant to search a tavern for drugs. The warrant was based on an informant's statement that he had observed drugs both on the person of a bartender and in a drawer behind the bar. 444 U.S. at 87-88. In executing the warrant, the officers searched not merely the premises but also every patron present in the bar, including Ybarra. An officer found heroin in Ybarra's possession and Ybarra was charged with unlawful possession of a controlled substance. *Id.* at 88-89.

This Court agreed with Ybarra that the search was unconstitutional. It held that

> a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. * * * Where the standard is probable cause, a search or seizure of a person must be supported by *probable cause with respect to that person.* This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91 (emphasis added).

2. In this case, petitioners are residents of 1116 Tree Street in Columbia, South Carolina, and other family members. On June 8, 2000, respondent Maldonado, a narcotics officer with the Richland County Sheriff's department, received information from a confidential informant alleging that he had seen a black male, in his late teens or early twenties, selling cocaine at that address. Pet. App. 2a. On the basis of this tip alone,[1] respondents sought

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[1] Deputy Maldonado was later disciplined by the Sheriff for failing to corroborate the informant's information. C.A. J.A. 257.

and obtained a search warrant not merely for the residence, but also for "all persons at the premise[s]." C.A. J.A. 248. In obtaining the warrant, the officers relied solely on "Deputy Maldonado's experience in drug enforcement that subjects present at the scene of illegal drug distribution commonly have drugs in their possession." Pet. App. 11a-12a (internal alterations and quotation marks omitted).

The officers went to the house later that day. They found there two young women, petitioners Latanya Owens and Tiffeny Owens, along with Latanya Owens's children, ages one and three. *Id.* at 3a, 22a. Neither Latanya nor Tiffeny, of course, fit the description of the young black male alleged to have engaged in drug sales. But on the basis of the "all persons" warrant, respondents nonetheless handcuffed Latanya and Tiffeny, led them into a separate room, and strip-searched them. *Id.* at 3a. Respondents found no drugs or other incriminating material. *Id.* at 4a.

Two other residents then returned home: petitioner William Clayton, aged thirty-eight, and petitioner Leshia Donaldson, owner of the residence and mother of Latanya and Tiffeny Owens. *Id.* at 3a; J.A. 256. Again, neither of these individuals fit the description of the young black male who allegedly had engaged in drug sales, but again on the basis of the "all persons" warrant, respondents searched Mr. Clayton and Ms. Donaldson as well. See Pet. App. 3a-4a. Respondents handcuffed and conducted an on-the-spot patdown of petitioner Clayton – the only man – and took petitioner Donaldson to be strip-searched in the same room where they had previously taken the other female petitioners. *Id.* at 3a. Once again, neither search unearthed any evidence of any illegal activity. *Id.* at 4a.[2]

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[2] The officers admitted strip-searching the three female petitioners, although they denied petitioners' allegations that their undergarments were removed. Pet. App. 3a. The factual dispute is irrelevant to the legal questions presented by the petition because

Respondents subsequently completed their search of the house. They found no evidence of either cocaine sales or any other illegal activity. *Id.* at 25a.

3. Petitioners filed individual suits in state court against respondent Lott, the Richland County Sheriff; Deputy Maldonado; and two then-unnamed officers who had participated in the searches. Petitioners sought, among other things, damages under 42 U.S.C. 1983 for the violation of their Fourth Amendment rights. *Id.* at 4a, 25a.[3] Respondents removed the cases to federal court, where they were consolidated, and subsequently moved for summary judgment on petitioners' Fourth Amendment-based claims on the ground of qualified immunity. *Id.* at 4a

Following the two-step qualified immunity analysis prescribed by this Court, see *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); see also *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001), the district court first found that respondents' conduct violated the Fourth Amendment under *Ybarra*. "[T]he 'all persons' warrant in this case [was] unconstitutional based on the teachings of *Ybarra*" because "it [did] not articulate particularized probable cause to search *any* specific individual" and "the connection between proximity to crime and involvement in crime [was] too tenuous to support a warrant as broad as the 'all persons' warrant of this case." Pet. App. 39a (citing *Ybarra*, 444 U.S. at 91) (emphasis in

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under either account, petitioners were subject to an evidentiary search.

[3] Petitioners do not challenge the right of the police to search *physical premises* without individualized probable cause as to each individual on the premises, nor do they challenge the right of officers to conduct appropriate protective searches (under the circumstances set out in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Michigan* v. *Summers*, 452 U.S. 692 (1981)) of people present at a premises search to ensure officer safety. Neither of those issues is presented by this case, in which the challenged police action involved intrusive evidentiary searches of individuals.

original and footnote omitted). Despite the district court's recognition of the necessary consequence of this Court's ruling in *Ybarra*, it nonetheless granted respondents' motion for summary judgment because, "[b]ased on the lack of Supreme Court and Fourth Circuit precedent dealing directly with 'all persons' warrants and the muddled line delineating the constitutional and unconstitutional use of 'all persons' warrants, * * * the right to be free of unconstitutional 'all persons' warrants was not sufficiently clear at the time of the violation for the defendants to be stripped of qualified immunity." *Id.* at 43a.

Petitioners appealed. The Fourth Circuit affirmed both aspects of the district court's holding. *Id.* at 2a. Regarding the antecedent question of the constitutional violation, the court of appeals agreed that petitioners had been subjected to an unconstitutional search. The court of appeals noted the overwhelming majority view, dating to the New Jersey Supreme Court's decision in *State* v. *DeSimone*, 288 A.2d 849, 854 (N.J. 1972), that "all persons warrants" are valid only "as long as there is probable cause to believe that *everyone* found on the premises being searched is involved in the illegal activity and that evidence of the crime would be found on their person." Pet. App. 9a (emphasis in original). Based on this standard, the court of appeals held that "Deputy Maldonado was not given sufficient information by his confidential informant and, in turn, did not supply the magistrate information to establish probable cause that 'all persons' at the residence were likely involved in illegal drug transactions." *Id.* at 16a.

But as to respondents' claims of qualified immunity, the Fourth Circuit found that no controlling authority had clearly established the merits of petitioners' Fourth Amendment claim because this Court had not squarely "addressed the circumstances, if any, under which an 'all persons' provision in a search warrant is constitutional." *Id.* at 17a (citing *Ybarra*, 444 U.S. at 92 n.4).

The court of appeals also considered whether there was a "'consensus of cases of persuasive authority'" on the issue. Pet. App. 17a (quoting *Wilson*, 526 U.S. at 617). After citing a few out-of-circuit cases – all but one of which had held that the Fourth Amendment forbids "all persons" warrants unless there is probable cause to believe that every person on the premises is involved in illegal activity – the Fourth Circuit concluded that because those cases articulated different legal *tests* they "provide no clear view, let alone a consensus, regarding what factors are most significant in deciding whether sufficient probable cause exists to support the search of 'all persons' found in a private residence being searched for drugs." *Id.* at 18a. The court held that the absence of a consensus on the relevant "factors" – despite the existence of a consensus on the correct *outcome* on these recurring facts – was sufficient to confer qualified immunity. *Ibid.*

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents two important circuit conflicts. The first concerns whether police officers are entitled to qualified immunity for the use of an "all persons" warrant – a frequently employed police investigatory tool – to search a person as to whom they have no individualized probable cause. In the course of resolving that square conflict, this Court would also eliminate the recurring disagreement among the lower courts over how to determine when "all persons" warrants comport with the Fourth Amendment. Uniform application of the Fourth Amendment requires this Court's intervention.

The second conflict is the three-way split regarding the proper role of out-of-circuit authority in the determination whether a constitutional right is clearly established. That conflict implicates the full breadth of constitutional claims in which government officials invoke the defense of qualified immunity.

Resolution of both conflicts is important for vindicating the constitutional rights of innocent individuals. The continued frequent use by police of "all persons" warrants creates an unacceptably high risk that such individuals will be swept into broad police searches simply by virtue of their location. When this occurs, a civil damages claim provides the only possible recourse, and unjustified application of qualified immunity eliminates their only remedy. Moreover, few cases cleanly presenting this issue are likely to reach this Court: the Fourth Circuit's approach to the role of out-of-circuit precedent is a substantial deterrent even to the filing of a civil rights suit that turns on such authority for success. In such cases, the plaintiff knows that her claim is doomed but for the entirely hypothetical prospect of review years later in this Court. When a case such as this one does reach this Court, it provides an especially appropriate opportunity to provide the lower courts with needed guidance.

I. This Case Presents the Square Conflict Among the Circuits Over Whether *Ybarra* Clearly Establishes the Unconstitutionality of "All Persons" Warrants in the Absence of Individualized Probable Cause.

The Fourth Circuit's decision cannot be reconciled with either the holding of the Ninth Circuit that officers employing "all persons" warrants without individualized probable cause are not entitled to qualified immunity or the holdings of the Third and Fifth Circuits that *Ybarra* clearly established that officers must have individualized probable cause to search all persons during a premises search.

A. The Fourth Circuit's Decision in This Case Conflicts with the Ninth Circuit's Holding That Officers Who Execute an "All Persons" Warrant in the Absence of Individualized Probable Cause Are Not Entitled to Qualified Immunity.

The Fourth Circuit's decision to grant qualified immunity in this case squarely conflicts with Ninth Circuit precedent. In *Marks* v. *Clarke*, 102 F.3d 1012, 1029 (1996), the Ninth Circuit held, on materially identical facts to these, that officers who executed an "all persons" warrant in a private residence were not entitled to qualified immunity for searches conducted in the absence of individualized probable cause. In *Marks*, police officers obtained a warrant to search two residences and "any person present" as the result of a tip that stolen property was being sold on the premises. *Id.* at 1019, 1028. (Although the officers had requested only a warrant to search the premises, two specified individuals, and "any other persons present 'for officer safety,'" *id.* at 1019, the magistrate issued a warrant permitting searches "of all persons present on the premises for the purpose of obtaining evidence," *id.*) In executing the warrant, officers encountered several women and children and searched each one. *Id.* at 1021-22. The officers could offer no justification for searching everyone other than their belief that each house was a "den of thieves" where contraband might be stashed on anyone. *Id.* at 1029. While the premises search yielded large amounts of cash and stolen property, the individual searches turned up no additional evidence, and criminal charges were filed against only four of the more than two dozen individuals who had been searched. *Id.* at 1023. The people subjected to the searches filed a Section 1983 lawsuit against the officers for violations of their Fourth Amendment rights. *Id.* at 1015.

The Ninth Circuit held that the district court properly granted summary judgment "against those officers who participated in the search of persons present at the premises

* * * except those persons as to whom probable cause existed." *Id.* at 1034 (emphasis omitted). It held that the officers conducting those searches were not entitled to qualified immunity because this Court's decision in *Ybarra* v. *Illinois* clearly established that such an "all persons" warrant violates the Fourth Amendment "unless supported by probable cause as to each individual present." *Id.* at 1027. Moreover, *Ybarra* had clearly established that propinquity to a crime scene, by itself, is insufficient to support a finding of probable cause to search every individual at the scene. *Id.* at 1029. Thus, the Ninth Circuit concluded that the officers "who conducted indiscriminate searches of all persons present at the * * * residences failed to act in an objectively reasonable manner, and are not entitled to qualified immunity." *Ibid.*

The Ninth Circuit acknowledged that a footnote in *Ybarra* had left "open the question of the constitutional propriety of a warrant that specifically authorized the search of unnamed persons in a place." *Id.* at 1027 (citing *Ybarra*, 444 U.S. 92 n.4). But the court explained that the question was left open *only* insofar as the warrant was "supported by probable cause" to believe that the unnamed individuals would be in possession of items subject to seizure. *Ibid.* When, as in *Marks*, the officers lacked "probable cause as to each individual present," the question left open by *Ybarra* was not implicated. *Ibid.*

The Fourth Circuit's ruling in this case is utterly irreconcilable with the Ninth Circuit's decision in *Marks* in both reasoning and result. In both cases, the officers provided no specific information to establish probable cause that the individuals they sought authorization to search were involved in illegal activities. See Pet. App. 16a; *Marks*, 102 F.3d at 1028. Rather, the officers' articulated justification for each "all persons" search was merely an assumption that anyone near the location of the search would be likely to possess contraband. See Pet. App. 11a-12a; *Marks*, 102 F.3d at 1029.

Both the Fourth and Ninth Circuits concluded that the officers' conduct violated the Fourth Amendment, but they reached opposite results regarding the vital remedial question of the availability of qualified immunity. Whereas the Ninth Circuit concluded that *Ybarra* conclusively resolved the constitutionality of "all persons" warrants, the Fourth Circuit disagreed. Pet. App. 17a; *Marks*, 102 F.3d at 1027. The irreconcilable readings of *Ybarra* by the two courts are even more striking given their reliance on the identical language in *Ybarra*'s footnote 4 to reach contrary conclusions. The Fourth Circuit cited footnote 4 in *Ybarra* on two separate occasions for the proposition that this Court had not yet resolved "[w]hether, and under what circumstances, an 'all persons' warrant is valid under the Fourth Amendment." Pet. App. 8a, 17a. In stark contrast, the Ninth Circuit quoted footnote 4 of *Ybarra* to support its conclusion that the defendants were not entitled to qualified immunity because *Ybarra* had clearly established that their conduct was unconstitutional. *Marks*, 102 F.3d at 1027. Only this Court, of course, can resolve the conflict over the proper construction of *Ybarra*.

B. The Fourth Circuit's Ruling Conflicts With the Third and Fifth Circuits' Holding That *Ybarra* Clearly Established That "All Persons" Searches Violate the Fourth Amendment in the Absence of Individualized Probable Cause.

Certiorari is also warranted because the Fourth Circuit's decision conflicts with the holdings of the Third and Fifth Circuits. Those courts have held that *Ybarra* precludes qualified immunity for searches of all persons on the premises of a suspected crime absent individualized suspicion. See *Doe* v. *Groody*, 361 F.3d 232 (CA3 2004), cert. denied, ___ U.S. ___ (Oct. 4, 2004) (No. 04-85); *Williams* v. *Kaufman County*, 352 F.3d 994 (CA5 2003). Both courts of appeals correctly recognize that *Ybarra* clearly established that mere propinquity to a crime scene is insufficient to establish

probable cause. See *Groody*, 361 F.3d at 244; *Williams*, 352 F.3d at 1005-06.

In *Doe* v. *Groody*, officers searched not only a residence and an individual identified in a warrant, but also that individual's wife and daughter. 361 F.3d at 236-37.[4] In response to the officers' claim that they had probable cause "to conduct the personal searches because of the ease with which contraband could be concealed on those present in the searched premises," the Third Circuit declared that "that is precisely the justification for a personal search that has been rejected by the Supreme Court. [*Ybarra*, 444 U.S.] at 94-96. Simply put, there is none of the kind of 'particularized' probable cause required for a search in circumstances such as these. *Id.* at 91." 361 F.3d at 243. The Third Circuit thus understood *Ybarra* to clearly establish as of 1979 "that the search of [individuals] for evidence had to be based on probable cause, and not on a generalized concern that those present at a search might hide evidence." *Id.* at 244. On that basis, the Third Circuit not only held the underlying search unconstitutional but also denied the officers qualified immunity. *Ibid.*

In *Williams* v. *Kaufman County*, officers obtained a search warrant authorizing them to search a nightclub and to arrest particular suspects named in the affidavit used to secure the warrant. 352 F.3d at 1000. The affidavit named five individuals suspected of dealing crack cocaine, and it also stated that other persons whose identities were unknown to the officers were suspects. *Id.* at 999. In executing the warrant, the officers searched everyone on the premises on the theory that there was probable cause "to believe that

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[4] The affidavit underlying the warrant in *Groody* sought permission to search all persons at the residence. *Groody*, 361 F.3d at 239. But because the warrant itself was limited to one particular individual, the Third Circuit held that the warrant did not authorize the searches. *Groody*, 361 F.3d at 239-43 (citing *Groh* v. *Ramirez*, 540 U.S. 551 (2004)).

everyone in there may have had drugs on them." *Id.* at 1004 (internal quotation marks omitted). The Fifth Circuit concluded that "*Ybarra* addressed a situation substantially similar to the one here, and explicitly held that officers must have * * * individualized probable cause to conduct a lawful search." *Id.* at 1006. Even though the circumstances of the search were "more hazardous than the one conducted in *Ybarra*" and made it "more likely that multiple persons would be in possession of drugs," the Fifth Circuit nevertheless held that the facts were insufficient to create probable cause to search each person. *Ibid.* And the Fifth Circuit concluded that *Ybarra* precluded granting the officers qualified immunity because both *Ybarra* and subsequent circuit precedent applying *Ybarra* gave fair notice to the officers that their conduct was unconstitutional. *Id.* at 1007.

The Third and Fifth Circuits – like the Ninth Circuit – would have rejected respondents' claim of qualified immunity. The *Williams* and *Groody* courts both held that *Ybarra* clearly established that searches of persons must be supported by individualized probable cause, which does not arise from mere propinquity to a suspected crime scene. In *Groody*, *Williams*, and the instant case, the officers lacked individualized suspicion to search the plaintiffs.[5] Just as the officers in *Groody* and *Williams* attempted to justify their "all persons" searches based on the likelihood that anyone near a place where drug deals allegedly occurred might conceal drugs on her person, the officers who searched petitioners relied solely on "Deputy Maldonado's experience in drug

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[5] Indeed, none of petitioners even remotely matched the description Deputy Maldonado's informant had given of the person allegedly selling drugs from petitioners' house. As the district court concluded, "on the facts of this case, where the informant reported seeing 'a black male' dispensing contraband, there was no probable cause to strip search the females who were present at the scene, or those who happened upon the scene as the search was in progress." Pet. App. 30a.

enforcement * * * that subjects present at the scene of an illegal drug distribution * * * commonly have drugs in their possession." Pet. App. 11a-12a (internal quotation marks and alterations omitted). The Third and Fifth Circuits correctly held that *Ybarra* clearly established the unconstitutionality of such searches.

Williams and *Groody* cannot be distinguished on the ground that they involved an "all persons" *search* but did not involve an "all persons" *warrant*. The presence or absence of a warrant does not change the question whether probable cause exists. Nor is it relevant to the qualified immunity analysis. As this Court held in *Malley* v. *Briggs*, if "a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant * * * the officer's application for the warrant was not objectively reasonable" and he is not entitled to qualified immunity. 475 U.S. 335, 345 (1986). The fact that respondents secured a warrant without having probable cause – the issue resolved by *Ybarra*, which held, as a matter of law, that mere propinquity cannot establish probable cause – thus provides no defense to this Section 1983 action.

The Fourth Circuit's decision in this case thus conflicts with the position taken by the three other circuits to have squarely addressed the question whether police officers who conduct "all persons" searches without individualized probable cause are nonetheless entitled to qualified immunity. This Court should grant certiorari to resolve that recurring conflict.

C. The Fourth Circuit Erred in Concluding that *Ybarra* Did Not Clearly Establish the Unconstitutionality of Respondents' Actions.

The Third, Fifth, and Ninth Circuits' understanding of *Ybarra* is correct; the Fourth Circuit's unique reading is wrong. *Ybarra* clearly established that the Fourth Amendment prohibits "all persons" searches unsupported by

individualized probable cause as to each person being searched. In particular, *Ybarra* plainly held that probable cause cannot be shown "by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and the Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places." 444 U.S. at 91 (citations omitted).

No reasonable officer could read *Ybarra* and conclude that he was entitled to seek an "all persons" warrant without providing any individualized basis to believe all persons on the premises to be searched were engaged in illegal activity. Whether an officer is preparing an affidavit seeking an "all persons" warrant, executing a warrant that authorizes him to search only enumerated individuals or a particular place, or deciding to conduct a warrantless search, he must ask exactly the same question: is there probable cause with respect to the particular individuals he seeks to search?

Consider a hypothetical situation in which an officer learns from an informant that an individual, Adam, made a drug sale from a residence the night before, and, incidentally, that living with Adam are three other persons: Barbara, Cathy, and Donna. In no way does the informant implicate Adam's three roommates in the drug sale. Drawing from his experience, the officer believes the roommates' mere propinquity to Adam makes it likely that they will have drugs in their possession. But this Court clearly established in *Ybarra* that such a belief is insufficient: "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." 444 U.S. at 91. Thus, if the officer were to submit an affidavit specifically naming all four roommates and requesting the authority to search their persons, he would certainly run afoul of *Ybarra*. Likewise, he could not enter the residence under the authority of a valid warrant authorizing him to search Adam and to search the house, and

then proceed to conduct an evidentiary search of the three women without any independent probable cause.

The Fourth Circuit derived its novel reading of *Ybarra* principally from a serious misreading of the last sentence of a single footnote in this Court's opinion. There, the Court wrote that "we need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs." 444 U.S. at 92 n.4. The court of appeals read this sentence broadly to leave unresolved whether "all persons" warrants unsupported by particularized probable cause nonetheless comport with the Fourth Amendment. Pet. App. 8a, 17a. That reading is seriously flawed.

The linchpin of the warrants hypothesized in the *Ybarra* footnote's last sentence is that the searches would be "*supported by probable cause*." *Ybarra*, 444 U.S. 92 n.4. (emphasis added). And *Ybarra* squarely holds that "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Id.* at 91. The Fourth Circuit, however, implausibly read *Ybarra* to leave open the constitutionality of warrants that were *not* supported by probable cause particularized with respect to the persons being searched. The Fourth Circuit's reading thus renders meaningless the very constitutional right this Court articulated in *Ybarra*. Moreover, by focusing only on the last sentence instead of the entire footnote, the Fourth Circuit failed to see that the footnote was actually addressing issues concerning the *particularity of a warrant's text*, not the underlying probable cause standard. See *Groh* v. *Ramirez*, 124 S. Ct. 1284, 1290 (2004) ("The Fourth Amendment requires that the warrant particularly describe the things to be seized." (quoting *United States* v. *Stefonek*, 179 F.3d 1030, 1033 (CA7 1999)) (emphasis omitted)). Noting the unconstitutionality of open-ended warrants, the footnote

emphasized that officers executing warrants cannot reasonably read them to provide carte blanche to search every person on the premises:

> The Fourth Amendment directs that "no Warrants shall issue, but upon probable cause * * * and particularly describing the place to be searched, and the persons or things to be seized." Thus, "open-ended" or "general" warrants are constitutionally prohibited. It follows that a warrant to search a place *cannot normally be construed* to authorize the search of each individual in that place. The warrant for the Aurora Tap Tavern *provided no basis for departing* from this general rule.

Ybarra, 444 U.S. at 92 n.4 (internal citations omitted, emphasis added, and ellipses in original).

Consequently, and as the Ninth Circuit correctly concluded in *Marks*, the footnote in *Ybarra* does not leave open the possibility that officers applying for "all persons" warrants can be relieved of the requirement to provide particularized probable cause to search all individuals as well as a particular premises. Rather, the footnote reserved the narrow question whether a warrant that does not set out by name the individuals to be searched can nonetheless satisfy the Fourth Amendment because it explains with constitutionally adequate particularity why there is probable cause to search the class of people described. See *Marks*, 102 F.3d at 1027 ("[T]he Court [held open the question of the constitutionality of "all persons" warrants] only to the extent that such a warrant is 'supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of [items subject to seizure].'" (citing *Ybarra*, 444 U.S. at 92 n.4) (second alteration in original)).

Certiorari should be granted because only this Court can correct the Fourth Circuit's erroneous interpretation of *Ybarra*.

D. This Case Would Resolve the Proper Test for Determining When the Fourth Amendment Permits the Use of "All Persons" Warrants.

In affording respondents qualified immunity, the Fourth Circuit reasoned that various courts of appeals and state supreme courts have adopted different approaches to deciding the underlying Fourth Amendment question of when "all persons" warrants are constitutional. See Pet. App. 17a-18a. For reasons petitioners explain *infra* Part II.B, the differences in how those courts have articulated the Fourth Amendment standard cannot justify the Fourth Circuit's grant of qualified immunity in this case. Nonetheless, the divergent approaches to how the constitutionality of "all persons" warrants ought to be analyzed creates substantial uncertainty with respect to this frequently used practice and may result in significant numbers of unremedied constitutional violations. Under this Court's qualified immunity jurisprudence, this case provides an ideal vehicle for bringing uniformity to this area, because the first step of the Court's analysis requires it to confirm that petitioners' constitutional rights were in fact violated. See *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."). The Court's ruling in this case would therefore bring uniformity to the conflicting formulations that now exist for determining the constitutionality of "all persons" warrants. As is obvious from the many opinions of the *dozens* of courts to have addressed the issue (see *infra* at 19-21), the proper standard for evaluating the constitutionality of "all persons" warrants is an important question for this Court to resolve.

All of the federal courts of appeals and state supreme courts to have addressed the question follow some variant of the rule announced long ago by the New Jersey Supreme Court in *State* v. *De Simone*, which permits "all persons"

warrants only when there is some particularized reason to believe that "everyone present is a party to the offense." 288 A.2d 849, 850 (1972). As an example of the rare "all persons" warrant that would satisfy the probable cause requirement, the *De Simone* court cited search warrants seeking evidence of an illegal gambling ring being "operated in a manhole or a barn," in which the "place is so limited and the illegal operation so overt" that anyone found at the premises was likely to be involved in the criminal activity there. *Ibid.* By contrast, the *De Simone* court explained, mere probable cause to believe that "lottery slips are [being] sold in a department store or an industrial plant" "obviously would not justify a warrant to search every person on the premises." *Ibid.*

Two federal courts of appeals (including the Fourth Circuit in this case) and three state supreme courts (including New Jersey itself) have explicitly adopted the *De Simone* standard. See Pet. App. 11a; *Marks*, 102 F.3d at 1029; *Commonwealth* v. *Smith*, 348 N.E.2d 101, 105-07 (Mass. 1976); *State* v. *Kinney*, 698 N.E.2d 49, 54 (Ohio 1998).[6] Six other state supreme courts apply variants of the requirement that "all persons" warrants be based on particularized or individualized probable cause.[7]

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[6] The Tenth Circuit has also adopted the *De Simone* standard in an unpublished opinion. See *United States* v. *Shields*, No. 98-3059, 1999 U.S. App. LEXIS 2496, at **5-8 (CA10 Feb. 18, 1999). Unpublished Tenth Circuit decisions are nonbinding but may be cited as persuasive authority on a "material issue that has not yet been addressed in a published opinion." 10th Cir. R. 36.3.

[7] See *State* v. *Jamison*, 482 N.W.2d 409, 412 (Iowa 1992) ("Where a warrant calls for the search of multiple places or persons, probable cause must exist as to each location or person sought to be searched under authority of the warrant."); *State* v. *Vandiver*, 891 P.2d 350, 357 (Kan. 1995) ("[T]he affidavit [requesting an all-persons warrant] must contain facts sufficient for the issuing magistrate to believe that the premises are confined to

Although all of these courts agree on the central principle of individualized probable cause announced by this Court in *Ybarra*, they disagree in important ways on the precise showing required to issue an "all persons" warrant.[8] This case presents the opportunity to resolve that disagreement.

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ongoing illegal activity and that every person within the orbit of the search possesses the items sought by the warrant."); *State* v. *Allard*, 674 A.2d 921, 923 (Me. 1996) ("[S]ufficient particularity in the probable cause sense * * * [is] whether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person."); *State* v. *Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) ("[W]hether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person."); *State* v. *Pecha*, 407 N.W.2d 760, 765 (Neb. 1987) ("[W]hether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person."); *People* v. *Nieves*, 330 N.E.2d 26, 32 (N.Y. 1975) ("The sufficiency of the description in this case will hinge in part on whether there was probable cause to believe that each and every occupant of the El Parador at any time of day possessed the policy slips and gambling records sought under the warrant.").

[8] See, *e.g.*, *Vandiver*, 891 P.2d at 357 (holding that "the affidavit must contain facts sufficient for the issuing magistrate to believe that the premises are confined to ongoing illegal activity"); *State* v. *Thomas*, 540 N.W.2d 658, 664 (Iowa 1995) (holding that the affidavit must demonstrate "the character of the premises, including its location, size, and public or private character; the nature of the illegal conduct at issue; the number and behavior of persons expected to be present when the warrant is to be executed; whether any persons unconnected with the alleged illegal activity have been seen on the premises; and the precise area and time in which the alleged activity is to take place"); *Nieves*, 330 N.E.2d at 34 (same as *Thomas*); *Smith*, 348 N.E.2d at 107 (holding that

There is further disagreement among the state intermediate courts of appeals. One set of courts holds that "all persons" warrants are *per se* unconstitutional.[9] Other intermediate state courts have adopted essentially the *De Simone* approach, holding that the Fourth Amendment requires individualized probable cause.[10] Finally, a single intermediate state court has adopted a rule under which respondents' conduct was constitutional. See *State* v. *Hayes*,

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"several facts are of particular relevance: the premises or area to be searched are small, confined and private; the nature of the criminal activity is such that the participants (in general) constantly shift or change so that it is, practically, impossible for the police to predict that any specific person or persons will be on the premises at any given time; and the items specifically described in the warrant as the target of the search are of a size or kind which renders them easily and likely to be concealed on the person"); *Kinney*, 698 N.E.2d at 57 (holding that affidavit must "delineate the character of the premises, * * * the nature of the illegal activity believed to be conducted at the location, the number and behavior of persons observed to have been present during the times of day or night when the warrant is sought to be executed[, and] * * * whether any person apparently unconnected with the illegal activity has been seen at the premises").

[9] See *People* v. *Tenney*, 101 Cal. Rptr. 419, 423 (Cal. Ct. App. 1972), overruled on other grounds by *People* v. *Leib*, 548 P.2d 1105 (Cal. 1976); *Johantgen* v. *Commonwealth*, 571 S.W.2d 110, 111-12 (Ky. Ct. App. 1978).

[10] See *Brooks* v. *State*, 593 So. 2d 97, 98-99 (Ala. Crim. App. 1991); *Betts* v. *State*, 920 P.2d 763, 764 (Alaska Ct. App. 1996); *People* v. *Johnson*, 805 P.2d 1156, 1159-61 (Colo. Ct. App. 1990); *Bergeron* v. *State*, 583 So.2d 790, 791 (Fla. Dist. Ct. App. 1991); *People* v. *Reed*, 559 N.E.2d 1169, 1171-72 (Ill. App. Ct. 1990); *People* v. *Jackson*, 446 N.W.2d 891, 893 (Mich. Ct. App. 1989), overruled on other grounds by *People* v. *Goldston*, 682 N.W.2d 479 (Mich. 2004); *State* v. *Blevins*, 968 P.2d 402, 403 (Utah Ct. App. 1998); *Morton* v. *Commonwealth*, 434 S.E.2d 890, 891-92 (Va. Ct. App. 1993); *State* v. *Carter*, 901 P.2d 335, 337-39 (Wash. Ct. App. 1995).

540 N.W.2d 1 (Wis. Ct. App. 1995) (upholding an "all persons" warrant supported only by an officer's belief that persons near drug sales generally possess drugs themselves). As these cases attest, police departments around the country continue to use "all persons" warrants in a wide variety of circumstances. By granting certiorari and applying the two-step *Wilson* analysis, this Court would resolve the conflict over when – if at all – this frequently employed law-enforcement tool is in fact consistent with the Fourth Amendment.

II. This Court Should Grant Certiorari to Secure Uniform Application of the Qualified Immunity Doctrine.

If this Court concludes that *Ybarra* itself does not clearly establish the unconstitutionality of respondents' actions, the Court will then need to consider whether petitioners' rights were nonetheless clearly established by other judicial authority, such as the longstanding, widespread line of authority stemming from the analysis first articulated by the New Jersey Supreme Court in *State* v. *DeSimone*, 288 A.2d 849 (N.J. 1972). In so doing, the Court would resolve a significant conflict among the circuits regarding the proper role of out-of-circuit authority in determining whether law is clearly established for purposes of qualified immunity.[11]

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[11] This issue differs from the second question presented by No. 03-710, *Devenpeck* v. *Alford*, cert. granted, 124 S. Ct. 2014 (2004). The petitioners in *Devenpeck* argue simply that the Ninth Circuit failed to recognize that "conflicting precedent" from other circuits, Pet. Br. at 31, as well as contradictory precedent from state supreme courts within the Ninth Circuit, see *id.* at 28-29, undercut any claim that the "closely related offense doctrine" constituted clearly established law. This case raises an anterior question: what is the relevance of out-of-circuit precedent that is entirely consistent on the underlying question of constitutionality with respect to whether law is clearly established? Thus, the reasons for granting this petition are largely independent of *Devenpeck*, which

The Fourth Circuit's grant of qualified immunity, premised upon the fact that out-of-circuit authorities apply different legal tests to "all persons" warrants, squarely conflicts with the qualified immunity methodologies employed in at least seven other circuits. Six circuits would have denied respondents qualified immunity because, despite the fact that out-of-circuit authorities articulate different tests, those tests would all have led to the conclusion that respondents' conduct here was unconstitutional. On the other hand, the Eleventh Circuit (and possibly the Second Circuit) would refuse to consider out-of-circuit authority at all in determining whether a constitutional right is clearly established. This case provides the ideal vehicle to establish a uniform rule among the circuits to ensure consistent protection of civil rights.

A. There Is a Split Among the Circuits Regarding the Role of Out-of-Circuit Authority in the Qualified Immunity Analysis.

After concluding that there was no direct authority on point, the Fourth Circuit looked for a "'consensus of cases of persuasive authority'" that might nevertheless clearly establish petitioners' Fourth Amendment right. Pet. App. 17a (quoting *Wilson*, 526 U.S. at 617). The court of appeals concluded that, because out-of-circuit authorities disagreed on "what factors are most significant" in determining the existence of probable cause for an "all persons" warrant, such a consensus did not exist. Pet. App. 18a. It reached this conclusion notwithstanding that respondents' conduct violated the Fourth Amendment under the test adopted by every circuit and every state supreme court and would be sustained as lawful only by a single intermediate state court of

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does not address the questions whether "all persons" warrants and searches without particularized probable cause are unconstitutional and whether their unconstitutionality was clearly established at the time petitioners in this case were searched.

appeal. See *supra* Part I.D. The Fourth Circuit's methodology conflicts with the methodology applied in other circuits.

First, there is a clear split among the courts of appeals on whether persuasive authority from other circuits is relevant *at all* in analyzing whether an official is entitled to qualified immunity. The Eleventh Circuit categorically refuses to look to out-of-circuit authority on questions of qualified immunity. See *Thomas ex rel. Thomas* v. *Roberts*, 323 F.3d 950, 955 (CA11 2003) ("As we have stated, only Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can 'clearly establish' law in this circuit." (citations omitted)). The Second Circuit has recently adopted the same approach, though there is also prior circuit authority taking the opposite view. See *Moore* v. *Vega*, 371 F.3d 110, 114 (CA2 2004) ("Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established."); *African Trade & Info. Ctr., Inc.* v. *Abromaitis*, 294 F.3d 355, 361 (CA2 2002) (noting that "our decisions send conflicting signals" on this issue).

In contrast, seven circuits (including the Fourth) agree that persuasive out-of-circuit authority can, under at least some circumstances, clearly establish a constitutional right. See Pet. App. 17a; *Boyd* v. *Benton County*, 374 F.3d 773, 781 (CA9 2004) ("[I]n the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes * * *.") (quotation marks and citation omitted); *Peterson* v. *Jensen*, 371 F.3d 1199, 1202 (CA10 2004) ("A right is clearly established * * * if the clearly established weight of authority from other circuits found a constitutional violation from similar actions.") (quotation marks and citations omitted); *McClendon* v. *City of Columbia*, 305 F.3d 314, 331 (CA5 2002) (looking to "cases from our sister circuits" to determine whether the relevant law was clearly established); *Buckley* v. *Rogerson*, 133 F.3d 1125, 1129 (CA8 1998) ("In the absence

of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits and district courts."); *Walton* v. *City of Southfield*, 995 F.2d 1331, 1336 (CA6 1993) ("In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law."); *Cleveland-Purdue* v. *Brutsche*, 881 F.2d 427, 431 (CA7 1989) (stating that "[i]n the absence of a controlling precedent" the court would "look to all relevant caselaw" in determining whether the law was clearly established).

Second, even among the circuits that do look to persuasive authority, there is a split regarding how such authority should be used. As noted *supra*, the Fourth Circuit in this case held that there was no consensus as to whether the unconstitutionality of respondents' actions was clearly established because courts of persuasive authority applied different *legal tests* to "all persons" warrants.

The other six circuits that consider out-of-circuit authority conduct a very different inquiry. Those courts look not at what legal test the other circuits apply but at what the *outcome* of the case would be in other circuits. See *Boyd*, 374 F.3d at 781 ("[W]e must ask whether, despite the absence of binding precedent, there was sufficient non-binding authority to place the officers on notice that *using a flash-bang in these circumstances* would be excessive.") (emphasis added); *Peterson*, 371 F.3d at 1202 (for law to be clearly established by either binding or persuasive authority, "the contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates the right") (emphasis added); *McClendon*, 305 F.3d at 331 (stating the issue in the case as whether persuasive authority "provide[s] a reasonable officer in Detective Carney's position with fair warning that providing Loftin with a gun would violate McClendon's rights"); *Buckley*, 133 F.3d at 1129 (looking "to the state of the decisional law at the time in question to determine whether a reasonable person in Loffelholz's position would have known that *his conduct* would violate

Buckley's Eighth or Fourteenth Amendment rights") (emphasis added); *Walton*, 995 F.2d at 1336 (persuasive cases can clearly establish a right if they "both point unmistakably to the *unconstitutionality of the conduct complained of* and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of the reasonable officer that *his conduct*, if challenged on constitutional grounds, would be found wanting") (emphasis added); *Cleveland-Purdue*, 881 F.2d at 431 ("[W]e look to all relevant caselaw in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that *the official's conduct* was unlawful.") (emphasis added).

This case starkly demonstrates how these two methodologies lead to different results. As petitioners have explained, *supra* Part I.D., federal courts of appeals and state supreme courts differ in the factors they consider (and what weight to give them) in deciding whether probable cause exists to search "all persons." Yet, as the discussion *supra* also highlighted, all of these courts would nonetheless agree that respondents' conduct *here* was unconstitutional. Thus, although the Fourth Circuit's approach to determining whether the law was clearly established led it to grant qualified immunity, the other six circuits that look to out-of-circuit precedent would have reached the opposite result and concluded that petitioners' rights *were* clearly established. Certiorari should be granted to resolve that conflict.

B. Qualified Immunity Is Unwarranted When Courts of Persuasive Authority Agree on the Unconstitutionality of a Defendant's Conduct.

Certiorari is also warranted because the methodology employed by the Fourth Circuit in this case – focusing on disagreement in the different articulated legal tests other courts employ for "all persons" warrants – is incorrect. As this Court explained in *Saucier* v. *Katz*: "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer

that his conduct was unlawful *in the situation he confronted.*" 533 U.S. 194, 202 (2001) (citing *Wilson*, 526 U.S. at 615) (emphasis added). By ignoring this rule, the Fourth Circuit arbitrarily created ambiguity where none existed. This Court has also indicated that the Eleventh and Second Circuits are incorrect to ignore out-of-circuit authority altogether. In *United States* v. *Lanier*, this Court held persuasive authority sufficient to establish "fair warning" in criminal civil rights proceedings largely by analogy to its qualified immunity precedents. See 520 U.S. 259, 268-70 (1997). "Although * * * disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it." *Id.* at 269. Two years later, *Wilson* upheld a grant of qualified immunity but indicated that a different result would have been reached had petitioners "identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." 526 U.S. 603, 617 (1999).

By granting certiorari here, this Court can assure uniform application of the correct rule even in the circuits that have thus far resisted it.

C. This Case Is an Excellent Vehicle for Resolving the Circuit Split.

The near-universal agreement among the on-point persuasive authorities as to the unconstitutionality of respondents' conduct makes this case an ideal vehicle for resolving the role of out-of-circuit authority in the qualified immunity determination. First, it is indisputable that the conflict over the appropriate qualified immunity standard is outcome determinative here. Petitioners could hardly have a better case under the majority rule, yet they lost below, just as they would have in the Eleventh Circuit (and likely in the

Second Circuit as well). They would have prevailed in the remaining circuits.

Second, petitioners' Fourth Amendment claim is obviously exceedingly strong on the merits. (Indeed, both courts below squarely held that the "all persons" search in this case was unconstitutional.) Thus, it is highly unlikely that this Court's consideration of the second *Wilson* prong will be mooted by a failure to satisfy the first – *i.e.*, by a determination by this Court that the officers' search of "all persons" absent any particularized suspicion, much less individualized probable cause, did not violate petitioners' Fourth Amendment rights.

The Court should take this unique opportunity to resolve the questions presented because cases that clearly present these important and recurring questions are generally unlikely to proceed through the appellate process. In the Eleventh Circuit (and likely the Second as well), it would be foolhardy for a plaintiff even to *file* a Section 1983 damages action without the benefit of controlling circuit authority: even if the court agrees that the plaintiff's constitutional rights were violated, recovery of damages would be impossible and the suit worthless. As the Seventh Circuit explained, "[t]o rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be *certain* to be unable to obtain any damages." *Burgess* v. *Lowery*, 201 F.3d 942, 945 (CA7 2000) (Posner, C.J.) (emphasis in original). Alternatively, for a case such as this one to arise in one of the majority-rule circuits, a state officer would not merely have to commit a constitutional tort in clear contravention of established authority, but also implausibly refuse to settle the case in order to challenge that circuit's qualified immunity methodology. The fact that this circuit split most often plays itself out in such unreviewable ways counsels strongly in favor of granting certiorari here.

Certiorari is also warranted because the question of how to assess whether law is clearly established for purposes of qualified immunity is tremendously important to the vindication of constitutional rights. Both Congress and this Court have emphasized the vital importance of citizens having the ability to obtain recovery when their constitutional rights are violated by government action. See *Wyatt* v. *Cole*, 504 U.S. 158, 161 (1992) (discussing the deterrent and compensatory purposes behind Congress's enactment of Section 1983); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163, (1803))). Section 1983 and *Bivens* damages actions often represent the only way for litigants to vindicate their constitutional rights. This case is a perfect illustration. Because petitioners committed no crime, their Fourth Amendment rights could not be enforced through application of the exclusionary rule. This Court should take advantage of this rare opportunity to assure the smooth functioning of the machinery of civil constitutional enforcement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 13, 2004[12]

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[12] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Eric J. Feigin, David B. Sapp, and Sean P. Tonolli. Clinic members Michael P. Abate, Daniel S. Goldman, C. Lee Reeves, and Mara A. Silver also contributed.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1194

DESTINY OWENS, a minor under the age of fourteen years, by and through her mother and Guardian ad Litem, Latanya Owens; LEISHIA DONALDSON; WILLIAM CLAYTON; GREGORY OWENS, a minor under the age of fourteen years, by and through his mother and Guardian ad Litem, Latanya Owens; LATANYA OWENS, APPELLANTS,

v.

Leon Lott, Richland County Sheriff; J. Maldonado; Jane Doe; Richard Doe, Richland County Deputy Sheriffs, APPELLEES.

Submitted: December 3, 2003
Filed: June 15, 2004

Appeals from the United States District Court for the District of South Carolina, at Columbia.

Before MICHAEL, TRAXLER and SHEDD, Circuit Judges.

OPINION

TRAXLER, Circuit Judge.

Tiffeny Owens, Latanya Owens, Leshia Donaldson, and William Clayton (collectively "plaintiffs") brought this civil rights action under section 1983 against Deputy Sheriff Gerardo Maldonado, the Sheriff of Richland County, and two unnamed Richland County deputies, identified as "Jane Doe" and "Richard Roe" (collectively "defendants"). Plaintiffs assert defendants violated the Fourth Amendment when defendants conducted a strip-search of the women and a patdown of Clayton pursuant to a search warrant for drugs

located at a private residence *and* "*all persons at the* premise[s]." J.A. 247. The district court agreed with plaintiffs that defendants' search was unreasonable under the Fourth Amendment; however, the court granted qualified immunity to defendants and awarded them summary judgment on that basis.

Plaintiffs appeal the district court's grant of qualified immunity, and defendants cross-appeal the district court's determination that their conduct, as alleged by plaintiffs, violated the Fourth Amendment. We reject both challenges and affirm the district court.

I.

On June 8, 2000, Deputy Gerardo Maldonado, a narcotics officer employed by the Richland County Sheriff's Department in Columbia, South Carolina, received a call from a confidential informant who claimed to have observed the sale of a large amount of cocaine at a private residence where he had stayed that night as a guest. According to the informant, from whom Deputy Maldonado had received accurate information on previous occasions, "a black male in his late teens or early twenties" had been selling the illegal drugs "in an expeditious manner" during the informant's visit. J.A. 139-40. Deputy Maldonado's informant suggested that law enforcement move swiftly in order to apprehend the drug dealer. Shortly after the phone call, the informant led Deputy Maldonado and Deputy Fred Brantley to a small house in which he claimed to have seen the drug transactions.

With the help of another officer, Deputy Jackie Kight, Deputy Maldonado drafted a proposed search warrant and executed a supporting affidavit, which he presented to a state magistrate judge around 4:00 p.m. on June 8. The affidavit stated the following:

> Within the past 72 hours a confidential and reliable informant has observed cocaine distributed from the location to be searched. The informant is reliable in that [he] has provided information of on at least four occasions that has [led] to at least four arrest[s] and

> the seizure of illegal drugs. Through the affiant's and other . . . Narcotic officers[']' experience in drug enforcement, it is known that subjects present at the scene of illegal drug [transactions] . . . commonly have drugs in their possession.

J.A. 247. Based on the foregoing statement, Deputy Maldonado sought a search warrant for "[c]ocaine, paraphernalia and paperwork associated with the sale, storage and use of cocaine" found on the premises identified by the informant, "to include *all persons* at the premise[s]." *Id.* (emphasis added). The magistrate judge signed the warrant, authorizing the officers to search "all persons at the premise[s]," *id.*, and deputies Maldonado and Kight, and several additional officers, immediately served and executed the warrant. Less than 24 hours elapsed between the time at which the confidential informant claimed to have witnessed the criminal activity and the execution of the warrant.

When defendants arrived, sisters Tiffeny and Latanya Owens were inside of the house with Latanya's two minor children. Officers initially handcuffed Tiffeny and Latanya and then Deputy Kight, a female officer, took them to a bathroom and performed a thorough search for drugs and weapons. Although Tiffeny and Latanya suggested in their deposition testimony that they had been required to remove undergarments to facilitate the search — which conflicts with Deputy Kight's assertion that she never removes clothing during a search — there is no claim before us that the *manner* in which the search was conducted was itself unconstitutional.

Soon after Deputy Kight had conducted the search of Tiffeny and Latanya, their mother, Leshia Donaldson, arrived with her fiancé William Clayton. Donaldson, who owned the property, was escorted by Kight to the bathroom and searched for drugs and weapons in the same manner as were her daughters. Like her daughters, Donaldson offered a version of what happened during the search that was not completely consistent with that of Deputy Kight, but she also does not contend that the manner of the search itself was

unconstitutional. Officers frisked Clayton over his outer garments for drugs and weapons. No narcotics were found in the search of the house or its occupants.

All four adult subjects of the search, as well as the two minors, filed this action in state court against the Sheriff of Richland County, Deputy Maldonado and two officers who participated in the execution of the search warrant, identified as Jane Doe and Richard Roe, alleging that the search of the individuals violated the Fourth Amendment. It is undisputed that the defendant identified as "Jane Doe" is Deputy Kight. The remainder of plaintiffs' claims — eight of them — were based on state tort law. Defendants removed the action to district court, asserted a qualified immunity defense, and sought summary judgment on that basis.

The district court followed the two-step qualified immunity analytical sequence prescribed by the Supreme Court. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). The court first held that the search of plaintiffs violated the Fourth Amendment's guarantee against "unreasonable searches and seizures." U.S. Const. amend. IV. The district court defined the issue as "whether police officers may validly obtain and execute a search warrant for 'all persons' present at a locale, absent showing of particularized probable cause to search each individual." J.A. 329. Rejecting the view that "all persons" warrants similar to that procured by Deputy Maldonado are *per se* unconstitutional, the district court adopted the widely-held position, as suggested in *State v. De Simone*, 288 A.2d 849 (N.J. 1972), that such warrants can pass constitutional muster if there was probable cause to believe "all persons" found at the location being searched "would be involved in the criminal operation" occurring there. *Id.* at 854; *see id.* at 850 (affirming the constitutionality of the search of a passenger in an automobile used to conduct an illegal gambling operation pursuant to a search warrant for the vehicle "'and all persons found therein.'"). The district court determined there was no such probable cause in this case, finding that "the only rationale . . . to support a claim of

particularized probable cause" to search all individuals found on the property was "the individual's proximity to the alleged [criminal] activity." J.A. 339. Citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), the court noted that, without more, "the connection between proximity to crime and involvement in crime [is] too tenuous to support . . . [an] 'all persons' warrant." J.A. 339-40.

Turning to the question of qualified immunity, however, the district court held that, at the time of the unconstitutional search, the right violated by defendants was not clearly established. The district court concluded that, "[b]ased on the lack of Supreme Court and Fourth Circuit precedent dealing directly with 'all persons' warrants," and the lack of consensus among decisions at the time that did touch on the issue, the law was insufficiently clear to divest defendants of their qualified immunity. J.A. 342. Accordingly, the court granted defendants qualified immunity, dismissed the section 1983 claim, and remanded the remaining claims, all of which are grounded in state law, to state court.

Defendants appeal the district court's conclusion that plaintiffs' section 1983 action states a constitutional violation; defendants agree with the district court, of course, that the law was not clearly established for purposes of qualified immunity. Conversely, plaintiffs agree with the district court's determination that the search was constitutionally invalid, but challenge the court's conclusion that the law was not "clearly established" at the time. We cannot completely accept either position because, in our opinion, the district court reached the correct result on both steps. Thus, we affirm the judgment of the district court.

II.

A court's evaluation of a qualified immunity defense to a section 1983 claim is a two-part process. Our first task is to determine whether the plaintiff has alleged the deprivation of a constitutional right. *See Saucier*, 533 U.S. at 200-01. If so, only then do we undertake the next task of determining "whether the right was clearly established at the time such

that it would be clear to an objectively reasonable officer that his conduct violated that right." *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002). Thus, liability will not be imposed "when an officer violates [a constitutional right]" unless "a reasonable officer would know that the specific conduct at issue was impermissible." *Rogers v. Pendleton*, 249 F.3d 279, 285 (4th Cir. 2001); *see Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987).

We turn first to the question of whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show [that] the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. Specifically, we must decide whether the facts, viewed in a light most favorable to plaintiffs, establish that defendants' search of plaintiffs pursuant to the "all persons" language in the warrant was unreasonable under the Fourth Amendment.*

The Fourth Amendment ensures that citizens are "secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "[R]easonableness requires probable cause and a warrant unless one of the exceptions to the warrant requirement applies," *Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000); *see Katz v. United States*, 389 U.S. 347, 357 (1967), a principle drawn from the Fourth Amendment's prohibition against the issuance of warrants without "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The magistrate issuing the search warrant must "make a practical,

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* This opinion employs the term "all persons warrant" to mean (generally) a search warrant authorizing the search of a particular place for evidence of a particular crime, as well as "all persons" found on the premises at the time of the search. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.5(e), at 545 (3d ed. 1996) ("One form of warrant which has been challenged with some frequency directs a search for particularly described items within a . . . home, apartment, store, or vehicle, including 'any and all persons found therein.'").

common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003). For that reason, in reviewing the sufficiency of a supporting affidavit, we avoid applying "'hypertechnical' scrutiny . . . lest police officers be encouraged to forgo the warrant application process altogether." *United States v. Robinson*, 275 F.3d 371, 380 (4th Cir. 2001) (quoting *Gates*, 462 U.S. at 236).

In addition to the requirement that a search warrant be supported by probable cause, the warrant must particularly describe the place where the search will occur and the "persons or things to be seized." Thus, the particularity requirement of the Fourth Amendment is directed at the warrant as opposed to the supporting affidavit. *See Groh v. Ramirez*, 124 S. Ct. 1284, 1289 (2004). Requiring particularity in the warrant itself serves a couple of important functions. Of course, there is the well-examined purpose of preventing general searches. *See Maryland v. Garrison*, 480 U.S. 79, 84 (1987) ("By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search . . . will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."). A search warrant that describes its object with particularity discourages the state from embarking on a "'general exploratory rummaging'" through a citizen's private residence. *United States v. Oloyede*, 982 F.2d 133, 138 (4th Cir. 1993) (per curiam) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). The particularity requirement also affords written assurance to "the individual whose property is searched or seized of the lawful authority of the executing officer, his

need to search, and the limits of his power to search." *Groh*, 124 S. Ct. at 1292 (internal quotation marks omitted).

Whether, and under what circumstances, an "all persons" warrant is valid under the Fourth Amendment presents a novel question in this circuit. It also remains unanswered in the Supreme Court, which acknowledged this issue in *Ybarra*, 444 U.S. at 92 n.4, but left its resolution for another day. Only a smattering of federal courts have addressed the difficulties presented by the inclusion of "all persons" language in a premises search warrant, *see Marks v. Clarke*, 102 F.3d 1012, 1029 (9th Cir. 1997); *Baker v. Monroe Township*, 50 F.3d 1186, 1188-89 n.1 (3d Cir. 1995); *id.* at 1199 (Alito, J., dissenting); *United States v. Guadarrama*, 128 F. Supp. 2d 1202, 1206-14 (E.D.Wis. 2001) (collecting cases); *United States v. Graham*, 563 F. Supp. 149, 151 (W.D.N.Y. 1983), and a few others have mentioned it in passing, *see Burns v. Loranger*, 907 F.2d 233, 234 n.2 (1st Cir. 1990); *Guzman v. Estelle*, 493 F.2d 532, 533-34 & n.7 (5th Cir. 1974); *United States v. Johnson*, 475 F.2d 977, 979 n.5 (D.C. Cir. 1973). The most extensive treatment of the question, by far, has been given in the state courts. *See Guadarrama*, 128 F. Supp. 2d at 1206-09 (compiling a comprehensive list of state court decisions from more than thirty-five jurisdictions).

The minority view emerging from these decisions is that a premises search warrant that also authorizes the search of "all persons" found on the premises being searched contravenes the particularity requirement of the Fourth Amendment and is invalid on its face. Common to the minority position is the view that there is an "uncomfortable similarity between [the] 'all persons' warrant and [the] general warrant." *Id.* at 1207. In sum, a handful of decisions suggest that an "all persons" warrant is invalid *per se* under the Fourth Amendment, concluding it is either functionally the same as a general warrant, or it is not sufficiently particular to satisfy the requirements of the Fourth Amendment's Warrant Clause. *See, e.g., State v. Cochran*, 217 S.E.2d 181, 183-84 (Ga. Ct. App. 1975).

By contrast, a majority of the courts have rejected the idea that an "all persons" warrant could never under any circumstances be constitutional. The New Jersey Supreme Court's opinion in *De Simone* emerged as the leading decision for the view that an "all persons" warrant is not unconstitutional *per se*, but rather is valid as long as there is probable cause to believe that *everyone* found on the premises being searched is involved in the illegal activity and that evidence of the crime would be found on their person. *See* 288 A.2d at 854. Under such a fact-dependent approach, the constitutionality of a search based upon a person's physical proximity to the illegal activity turns wholly on the context of the search. Thus,

> [a] showing that [illegal] lottery slips are sold in a department store or an industrial plant obviously would not justify a warrant to search every person on the premises, for there would be no probable cause to believe that everyone there was participating in the illegal operation. On the other hand, a showing that a dice game is operated in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that it is likely that everyone present is a party to the offense. Such a setting furnishes not only probable cause but also a designation of the persons to be searched which functionally is as precise as a dimensional portrait of them.

Id. at 850. *De Simone* involved an illegal gambling business that several individuals operated from their automobiles, using the vehicles as a "drop" or "pickup" for the exchange of money and gambling slips. Officers who had observed the operation obtained search warrants for the search of the vehicles and "'all persons found therein.'" *Id.* The court observed that it was "reasonable to conclude . . . that a passenger in the car was probably a party [to the wrongdoing] . . . [because] a driver would not likely bring . . . an uninvolved person who would witness" drops and pickups to

and from an empty car. *Id.* at 852. The close quarters in the interior of a car makes a passenger's presence more indicative of complicity in the illegal activities "than would be presence in a building in which some illegality may be occurring." *Id.* at 851.

Although *Ybarra v. Illinois* did not address a so-called "all persons" warrant, it sheds additional light on our analysis. Officers in *Ybarra* obtained a warrant to search the premises at a public tavern, as well as the bartender, for narcotics. A state statute allowed officers who were executing the warrant "to search any person in the place . . . (a) [t]o protect himself . . . or (b) *to prevent the disposal or concealment of* . . . things particularly described in the warrant." 444 U.S. at 87 n.1 (emphasis added). There was no specific information giving officers probable cause to believe that anyone in the tavern, other than the bartender, was involved in the distribution of drugs. Indeed, the application for the warrant did not suggest that the tavern was regularly visited by drug-purchasing patrons — the sole connection between Ybarra and the drug transactions at the tavern was his presence "in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." *Id.* at 91. And, there was no reason that Ybarra would have appeared armed or dangerous. Nevertheless, officers patted down Ybarra and recovered heroin from his pocket.

In holding the search unconstitutional under the Fourth Amendment, the Court explained that there was no "probable cause particularized with respect to [Ybarra]" and that his "mere propinquity to others independently suspected of criminal activity d[id] not, without more," supply the missing probable cause. *Id.* The Court noted that, because of the particularity requirement of the Warrant Clause, a general warrant is impermissible, and "[i]t follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place." *Id.* at 92 n.4. Finally, the Court implied that the warrant issued for the tavern did not supply a basis for searching individuals in the bar,

although the Court recognized the possibility that a warrant could, under the right circumstances, provide that support: "[W]e need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs." *Id.*

We agree that the majority view, as articulated in *De Simone*, correctly holds that an "all persons" warrant can pass constitutional muster if the affidavit and information provided to the magistrate supply enough detailed information to establish probable cause to believe that all persons on the premises at the time of the search are involved in the criminal activity. In our view, the inclusion of "all persons" language in a warrant presents probable cause issues rather than particularity problems. "A search warrant authorization to search all persons found within a specifically described place is not lacking particularity in the sense that the executing officer will be unable readily to determine to whom the warrant applies." 2 Wayne R. LaFave, *Search and Seizure* § 4.5(e), at 546-57 (3d ed. 1996); *see De Simone*, 288 A.2d at 850-51 ("[W]ith regard to the Fourth Amendment demand for specificity as to the subject to be searched, there is none of the vice of a general warrant if the individual is . . . identified by physical nexus to the ongoing criminal event itself."). Thus, as long as "there is good reason to suspect or believe that anyone present at the anticipated scene will probably be a participant" in the criminal activity occurring there, "presence becomes the descriptive fact satisfying the aim of the Fourth Amendment." *De Simone*, 288 A.2d at 851.

In this case, we agree with the district court that Deputy Maldonado's affidavit did not supply sufficient information to establish probable cause that anyone who happened to be on the premises during the execution of the search warrant was involved in the sale of illegal drugs. The only justification presented to the magistrate for the search of "all persons at the premise[s]" was Deputy Maldonado's "experience in drug

enforcement . . . that subjects present at the scene of [an] illegal drug distribution . . . commonly have drugs in their possession." J.A. 247. This generalization was and is undoubtedly true, but it did not provide the kind of particularized information that would have permitted the magistrate to reasonably conclude that there was a fair probability that any person seen by officers on the premises was there to partake in one side of a drug transaction or another. At bottom, the search warrant authorized the search of individuals in this case based on nothing more than their proximity to a place where criminal activity *may or may not* have occurred. And, as the Supreme Court has explained, "a person's mere propinquity" to suspected criminal activity "does not, without more, give rise to probable cause to search that person." *Ybarra*, 444 U.S. at 91.

Defendants contend that the district court's conclusion was wrong in two respects: (1) the court erroneously believed that the "particularized probable cause" necessary to search an individual under an "all persons" warrant required Deputy Maldonado and his fellow officers to identify *specific individuals* to be searched; and (2) contrary to the district court's determination, there were sufficient facts to support probable cause to search anyone found on the premises for drugs — in other words, there was presented to the magistrate more than plaintiffs' mere propinquity to the alleged criminal activity. We cannot agree.

Defendants' contention that the district court found the search unconstitutional because law enforcement failed to identify any specific individual to be searched misconstrues the district court's decision. Defendants focus, to the exclusion of several pages of discussion, on the district court's statement that "the warrant failed to describe any particular individual." J.A. 339. Even a casual reading of the district court's opinion, however, makes clear that the district court properly understood that the relevant inquiry was whether there was "probable cause to believe 'all persons' present at [the subject residence] would be involved in

criminal activity," and that the search warrant failed because it did not "articulate particularized probable cause to search *any* specific individual." *Id.* Read in the context of the district court's entire opinion, the latter statement — and others like it — merely reflect the court's conclusion that there was no probable cause to search *any individual who happened to be on the premises* when the warrant was executed. The district court correctly concluded that there was simply no probable cause for the searches at issue — there was no probable cause to search "all persons at the premises," which includes the plaintiffs, and obviously there was no description or other specific information contained in the affidavit or warrant that would have permitted the search of plaintiffs separate and apart from the "all persons" language contained in the warrant.

Next, defendants argue that there were sufficient facts to establish probable cause to search "all persons" on the premises. Defendants offer several factors in support of this argument: the warrant was executed on the same day that the informant claimed to have witnessed the drug transactions; a large amount of cocaine was alleged to have been at the house; the informant reported that drugs were being sold rapidly; the premises to be searched was a small, single-family house; and each of the individuals searched had a "significant connection" to the premises, living there part-time or full-time. According to defendants, these allegations permit the reasonable assumption that the drug transactions were not yet complete and that any person who was at the house was involved. Further, defendants contend the fact that the house was small bolsters the conclusion that any person on the premises at the time of the search knew about the activity and was involved.

None of these facts appear in Deputy Maldonado's supporting affidavit. Our review of whether the search warrant was supported by probable cause — in other words, a review of the facts upon which the issuing magistrate relied — may not go beyond the information actually presented to

the magistrate during the warrant application process. *See Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. . . . A contrary rule would . . . render the warrant requirements of the Fourth Amendment meaningless."). In this circuit, the failure to include information within the four corners of the affidavit is not necessarily fatal, provided the information is actually presented to the magistrate — a magistrate "may consider sworn, unrecorded oral testimony in making probable cause determinations during warrant proceedings." *United States v. Clyburn*, 24 F.3d 613, 617 (4th Cir. 1994). All the record contains in this regard, however, is an affidavit filed in the district court by Deputy Maldonado recounting the information supplied by the informant, including the fact that the informant had witnessed the transactions in the early morning hours of that same day and that there was a large amount of narcotics involved. The size of the residence, which defendants contend is a critical factor in favor of probable cause, is not mentioned in Deputy Maldonado's federal affidavit, was apparently never given to the magistrate and was never a factor in the issuance of the search warrant. According to Deputy Maldonado, he drafted the supporting affidavit which he took to the magistrate; "[a]fter hearing the aforementioned background information, Judge Davis determined that probable cause existed . . . [and] signed the search warrant and supporting affidavit." J.A. 141. There is simply no indication in the record that any of the specific facts upon which defendants now rely were offered to the magistrate through sworn oral statements. Accordingly, defendants' argument relies upon facts extrinsic to the application process which will not aid them in the context of probable cause.

Furthermore, these facts, even if presented to the magistrate through sworn oral testimony, fail to provide the kind of information that would establish probable cause to

believe *every person* found on the premises was likely involved in the selling and buying of drugs. There was no indication, for example, that this particular residence had a history of drug-related activities or that known drug dealers or users were frequenting the place. *See Commonwealth v. Graciani*, 554 A.2d 560, 562 (Pa. Super. Ct. 1989) (search under "all persons" warrant valid relating to drug transactions occurring in residence where previous drug-related arrests had been made); *Morton v. Commonwealth*, 434 S.E.2d 890, 892-93 (Va. Ct. App. 1993) (upholding "all persons" warrant where officer's affidavit indicated that apartment manager had received prior complaints about crack distribution from the subject apartment and that recent surveillance had discovered the presence of known drug dealers in the apartment); *Commonwealth v. Smith*, 348 N.E.2d 101, 106 (Mass. 1976) ("all persons" warrant valid in light of recent comings and goings of known heroin traffickers). There was no ongoing drug activity evidenced by multiple transactions over an extended period of time; rather, the confidential informant reported having seen cocaine distributed from the residence on a single occasion. *See People v. Johnson*, 805 P.2d 1156, 1161 (Colo. Ct. App. 1990) (permissible to search every person found on the premises in light of "transactions [that] are continuous, ongoing, and obvious to even the most unsophisticated observer that criminal activity is taking place") (internal quotation marks omitted). Nor was there any "regular traffic" of individuals to and from the residence that would suggest ongoing drug activity. *See State v. Loins*, 993 P.2d 1231, 1235 (Kan. Ct. App. 1999) (collecting cases); *Smith*, 348 N.E.2d at 106. Furthermore, there was nothing about the condition of the house itself, its location or its surrounding neighborhood to suggest it served as a place likely to attract only people involved in the drug trade. *See People v. Nieves*, 330 N.E.2d 26, 34 (N.Y. 1975) (validity of "all persons" warrant determined in light of affidavit's description of "the character of the premises . . . its location, size, the particular area to be searched, means of access,

neighborhood"). Finally, although the search warrant pertained to non-public property — where ordinarily the presence of an innocent passerby is less likely than in a public facility like a train station — the *residential* nature of the premises and the fact that the search occurred during daytime or early evening hours presented the obvious risk that unsuspecting friends, neighbors, or laborers would be present during the search. *See State v. Jackson*, 616 N.W.2d 412, 419 (S.D. 2000) ("Another factor leading us to uphold this warrant is that it was executed at night, making it improbable that innocent people would show up by happenstance.").

In sum, Deputy Maldonado was not given sufficient information by his confidential informant and, in turn, did not supply the magistrate information to establish probable cause that "all persons" at the residence were likely involved in illegal drug transactions.

III.

The second phase of the qualified immunity analysis requires us to decide whether the conduct alleged by the plaintiff "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A preliminary task is to define the constitutional right at issue "at a high level of particularity." *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999). The right alleged to have been violated is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. This determination "is an objective one, dependent not on the subjective beliefs of the particular officer at the scene, but instead on what a hypothetical, reasonable officer would have thought in those circumstances." *Wilson v. Kittoe*, 337 F.3d 392, 402 (4th Cir. 2003). "Clearly established" does not mean that "the very action in question has previously been held unlawful," but it does require that, "in the light of pre-existing law the unlawfulness [of the official's conduct] must be apparent."

Wilson v. Layne, 526 U.S. 603, 615 (1999). In other words, "the exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established." *Amaechi v. West*, 237 F.3d 356, 362 (4th Cir. 2001). And, the absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity. *See Kittoe*, 337 F.3d at 403. We must consider "not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked." *Amaechi*, 237 F.3d at 362-63 (internal quotation marks omitted).

Whether a right has been specifically adjudicated or is manifestly apparent from broader applications of the constitutional premise in question, we look ordinarily to "the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." *Edwards*, 178 F.3d at 251 (internal alterations and quotation marks omitted). When there are no such decisions from courts of controlling authority, we may look to "a consensus of cases of persuasive authority" from other jurisdictions, if such exists. *Wilson*, 526 U.S. at 617; *see Amaechi*, 237 F.3d at 363.

There is no controlling authority that informs our analysis in this case. As we have already noted, the Supreme Court has not addressed the circumstances, if any, under which an "all persons" provision in a search warrant is constitutional, *see Ybarra*, 444 U.S. at 92 n.4, nor has this court done so. The vast majority of the decisions from other jurisdictions considering the validity of "all persons" warrants — mostly state decisions — conclude that a search warrant authorizing the search of "all persons" found on the premises does not violate the Fourth Amendment *per se*. Beyond that broad conclusion, however, courts impose different requirements for what is necessary to sustain the validity of such a warrant. The approach used in *De Simone*, for example, is to determine whether "there is good reason to suspect or believe that anyone present at the anticipated scene will probably be a participant" in the criminal conduct occuring there. 288 A.2d

at 851. Other jurisdictions, imposing more stringent requirements, "permit such warrants if the facts known to the issuing judge justify a belief that the premises are *confined to* ongoing illegal activity and that every person within the orbit of the search possesses the items sought by the warrant." *State v. Horn*, 808 P.2d 438, 439 (Kan. Ct. App. 1991) (emphasis added); *see Nieves*, 330 N.E.2d at 34. Still another approach is to find the warrant valid if there is a reasonable probability that persons involved in the criminal activity will be present during the execution of the warrant. *See State v. Hayes*, 540 N.W.2d 1, 4 (Wis. Ct. App. 1995). Moreover, these decisions provide no clear view, let alone a consensus, regarding what factors are most significant in deciding whether sufficient probable cause exists to support the search of "all persons" found in a private residence being searched for drugs. *Compare Hayes*, 540 N.W.2d at 3 (approving of search of "all persons" on the premises where supporting affidavit stated only that, in the officer's experience, it was common to find persons involved in the crime on the premises during the search and that such individuals commonly carried contraband on their persons) *with State v. Thomas*, 540 N.W.2d 658, 664 (Iowa 1995) (requiring the warrant application to include (1) "the character of the premises, including its location, size, and public or private character;" (2) "the nature of the illegal conduct;" (3) "the number and behavior of persons expected to be present . . . ;" (4) whether innocent individuals were seen on the premises; and (5) the time and place the alleged activity is to occur). We conclude that at the time of the search, the law was not sufficiently clear to strip defendants of qualified immunity.

IV.

For the foregoing reasons, we affirm the district court's determination that the search of plaintiffs violated their Fourth Amendment rights, but that these rights were not clearly established such that a reasonable officer would have understood that the search encroached upon those rights.

AFFIRMED

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No: 3:01-4574-17

DESTINY OWENS, a minor under the age of fourteen years, by and through her mother and Guardian ad Litem, Latanya Owens, PLAINTIFF,

v.

LEON LOTT, Richland County Sheriff; J. MALDONADO, Richland County Deputy Sheriff; JANE DOE; RICHARD DOE, Richland County Deputy Sheriffs, DEFENDANTS.

C/A No: 3:01-4575-17

LESHIA DONALDSON, PLAINTIFF,

v.

LEON LOTT, Richland County Sheriff; J. MALDONADO, Richland County Deputy Sheriff; JANE DOE; RICHARD DOE, Richland County Deputy Sheriffs, DEFENDANTS.

C/A No: 3:01-4577-17

WILLIAM CLAYTON, PLAINTIFF,

v.

LEON LOTT, Richland County Sheriff; J. MALDONADO, Richland County Deputy Sheriff; JANE DOE; RICHARD DOE, Richland County Deputy Sheriffs, DEFENDANTS.

C/A No: 3:01-4578-17

GREGORY OWENS, a minor under the age of fourteen years, by and through his mother and Guardian ad Litem, Latanya

Owens, PLAINTIFF,

v.

LEON LOTT, Richland County Sheriff; J. MALDONADO, Richland County Deputy Sheriff; JANE DOE; RICHARD DOE, Richland County Deputy Sheriffs, DEFENDANTS

C /A No: 3:01-4579-17

LATANYA OWENS, PLAINTIFF,

v.

LEON LOTT, Richland County Sheriff; J. MALDONADO, Richland County Deputy Sheriff; JANE DOE; RICHARD DOE, Richland County Deputy Sheriffs, DEFENDANTS

C /A No: 3:01-4580-17

TIFFENY OWENS, PLAINTIFF,

v.

LEON LOTT, Richland County Sheriff; J. MALDONADO, Richland County Deputy Sheriff; JANE DOE; RICHARD DOE, Richland County Deputy Sheriffs, DEFENDANTS

Jan. 13, 2003

Order Granting in Part Defendants' Motion for Summary Judgment and Remanding to State Court

JOSEPH F. ANDERSON, JR., District Judge

This case presents the rather difficult, and—in this circuit at least—novel, question of whether a search warrant validly executed for the purpose of searching a location, may also authorize the search (including, here, a strip search) of "all persons" who happen to be present at that particular location at the time of the search. This court holds that, on the facts

presented here, the search was unconstitutional because there was no particularized probable cause to search each individual. Because this right was not clearly established at the time, however, the officers conducting the search are protected by the doctrine of qualified immunity and therefore the claim asserted against them pursuant to 42 U.S.C. § 1983 must be dismissed. As to the remaining state law claims, the court will remand them to state court.

I. Procedural History

On June 8, 2000 several officers with the Richland County Sheriffs Department executed a search warrant for a residence at 1116 Tree Street in Columbia, South Carolina. The search produced no evidence of illegal activity. On October 31, 2001 the plaintiffs, all individuals present at the residence during the execution of the search warrant, filed complaints in the Richland County Court of Common Pleas alleging several state-law causes of action and federal civil rights claims under 42 U.S.C. § 1983. The defendants subsequently removed the cases to federal court. By order dated June 6, 2002, this court consolidated the cases for pretrial purposes only. The defendants filed a motion for summary judgment on all causes of action on August 13, 2002 and a hearing was held on September 25, 2002. After the hearing, the court requested additional briefing from the parties on the constitutionality of the search warrant in question. Those briefs have been received and reviewed and the matter is now ripe for the court's decision.

II. Factual Background

On June 8, 2000, a confidential informant called the cell phone of Deputy Sheriff J. Maldonado ("Maldonado") and provided information to Maldonado regarding drug activity the informant had observed at 1116 Tree Street. Specifically, the informant told Maldonado that, on the night of June 7, 2000 and early morning hours of June 8, he had seen a black male in his late teens or early twenties selling a large quantity of cocaine from the residence at that address. Based on this information, Maldonado agreed to meet the informant that

day so the informant could take Maldonado to the subject address. After confirming the address with the informant, Maldonado and Deputy Sheriff Jackie Kight ("Kight") drafted a search warrant and affidavit. During the afternoon of June 8, 2000, a magistrate judge signed the search warrant authorizing a search of the house described as follows: "Traveling on Tree St. it's the fifth house on the right from Senate St. towards Gervais St." The warrant further authorized the search of "all persons at the premises."

Maldonado, Kight, and several other deputies executed the warrant some time between 4:00 p.m. and 5:00 p.m. that day. The officers effected a "dynamic entry" wherein the front door or the residence was knocked in using a battering ram and the officers entered with guns drawn. Inside the house[1] were one resident, Tiffeny Owens (age 17) and three visitors, Tiffeny's sister Latanya Owens (age 18) and Latanya's two children, Gregory (age 1) and Destiny (age 3).

Upon entering the residence, the officers handcuffed Latanya and Tiffeny. Deputy Kight, a woman, then escorted the women, individually, to the bathroom of the residence to be "strip searched." While the Latanya and Tiffeny were made to lift up their shirts and bras and pull down their pants and underwear, they were not asked to disrobe completely. Tiffeny Owens, who was menstruating at the time of the search, initially refused to follow Officer Kight's instructions to pull down her pants and underwear, but complied after Officer Kight told Tiffeny she had no choice. (See Tiffeny Owens Dep. at 22-23.) Although the record is not completely clear as to whether Officer Kight touched Tiffeny and Latanya during the search, nothing in the record indicates that, if touching did occur, it was inappropriate in the context

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[1] Based on a search of the deed transfer and tax assessor records for Columbia, South Carolina, the court has found that the home at 1116 Tree Street has three bedrooms, one bathroom, and occupies 1056 square feet.

of the strip search.[2]

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[2] Latanya Owens claims to have been touched by Officer Kight. While her deposition supports her claim, it also indicates that the touching was fleeting and not done for salacious or inappropriate reasons.

> Q. And then you said that [Officer Kight] touched your person, she actually touched your breasts?
>
> A. Yes, she did.
>
> Q. And describe specifically how she touched your breasts, exactly where it was, how long it was.
>
> A. She kind of felt under to make sure nothing was under the breasts, you know. She kind of, like – well, I had my bra up, so they were up. She was just making sure, like, in the middle nothing was there.
>
> Q. So, from what you saw, she was trying to actually look in and around your breasts for a particular purpose?
>
> A. I would guess, yes.
>
> * * *
>
> Q. Describe [Officer Kight's] demeanor to you during your-all's conversation.
>
> A. I don't understand when you say demeanor.
>
> Q. Was she nice? Was she mean? Was she businesslike about it? I mean, tell me how she was.
>
> A. She was kind of not demanding, but she was more making it seem to me it was required.
>
> Q. Kind of like she wasn't doing that for her personal pleasure; she was doing this because it was required?
>
> A. She said it had to be done, that we have to search you is what she said, so I took it as it's required for me to do this. I have to take these clothes off.

Latanya Owens Dep. at 39-41. Tiffeny Owens's deposition appears to indicate that she was not touched by Officer Kight during the search.

> Q. Was [Officer Kight] touching your skin in any way. (sic) You said she touched your bra, and she popped your bra?
>
> A. Yeah, she like, felt around the bra.
>
> Q. She felt around your bra, not your person?
>
> A. No, she felt around in the bra, and then she popped the bra.
>
> Q. Okay. But up until this point we're not necessarily talking

After the search of the residence had begun, Leshia Donaldon ("Donaldson"), Latanya and Tiffeny's mother, and William Clayton ("Clayton"), Donaldson's boyfriend, both residents of 1116 Tree Street, arrived home from work. The officers handcuffed Clayton and escorted Donaldson back to the restroom to be searched in the same manner as her daughters, Tiffeny and Latanya, had been searched.[3] The

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about her touching your skin? She was going around your bra area?

A. Uh huh. Uh-huh.

Q. Right?

A. Yes.

* * *

Q. And I understand correctly that she did touch your garments and those things and ask you to do things, but did she ever touch you, your person, in conducting the search?

A. She, like, when I dropped my pants, she just like, looked around. She never really touched. She just looked.

Tiffeny Owens Dep. at 24, 27-28.

[3] Leshia Donaldson's deposition testimony, although somewhat inconsistent, indicates that she was touched by Officer Kight.

Q. So, they instructed you to go to the bathroom. What happened once you were in the bathroom?

A. The lady cop comes in, pull your shirt up, she – you know, just touched here (indicating), drop your pants and, okay, you know, that was it.

* * *

Q. Just so we're clear, okay, so she didn't touch you?

A. Did she touch me? No.

Q. She just gave you a look over?

A. Yes.

* * *

Q. So, while you were in the bathroom, she didn't touch you. She looked you over real good?

A. Yes, she did.

Q. After she did that, she let you go?

A. I'm going to take that back.

Q. Okay.

officers recovered nothing from the searches of the residence or individuals.[4]

III. Analysis

The motion before the court is the defendants' motion for summary judgment on all claims. While disposing of the federal civil rights claims under 42 U.S.C. § 1983, this court remands the remaining state law claims to state court for further proceedings. This order, therefore, will address only the merits of the Section 1983 claims.

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on

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A. I'm going to take that back. She had rubber gloves on, so, therefore, we lift our shirts, spread our legs, and she just, like, looked. She just touched to make sure nothing was there. That was it.

Q. Was it just kind of a real quick pat?

A. Yeah.

[Plaintiffs' Counsel]: Object to the form of the question.

By [Defendants' Counsel]:

Q. Was it a real quick pat or real extended pat where she stayed on you?

[Plaintiffs' Counsel]: Object to the form of the question, but you may answer.

By [Defendants' Counsel]:

Q. Tell me the manner in which she touched you.

A. (Indicating). As if they do – you know how you do a quick (indicating) or a quick pat down search like that (indicating).

Q. And she did this with rubber gloves?

A. She had rubber gloves on.

Leshia Donaldson Dep. at 33, 3 7, 38.39.

[4] The court notes that after the procurement and execution of the search warrant, Officer Maldonado received a written reprimand reminding him to corroborate information from informants in the future. (See Maldonado Dep. At 59-61.) The record is unclear as to whether Officer Kight or any of the other officers that participated in the execution of the warrant were reprimanded.

file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties,* 810 F.2d 1282, 1286 (4th Cir. 1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). When the defendant is the moving party and the plaintiff has the ultimate burden of proof on an issue, the defendant must identify the parts of the record that demonstrate the plaintiff lacks sufficient evidence. The nonmoving party, here the plaintiff, must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986).

B. Qualified immunity

In asserting a claim under 42 U.S.C. § 1983, the plaintiffs contend that the defendants violated their civil rights when they executed the search warrant on June 8, 2000.[5] The officers, in turn, claim they are protected by qualified immunity. Qualified immunity, as Justice Powell explained in *Harlow* v. *Fitzgerald,.* 457 U.S. 800 (1982), ensures that public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established

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[5] 42 *U.S.C.* § 1983 states in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights... secured by the Constitution ... shall be liable to the party injured ... ." 42 U.S.C. § 1983 (2000).

statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The United States Court of Appeals for the Fourth Circuit has stated that qualified immunity "ensures that these officials can perform their duties free from the specter of endless and debilitating lawsuits." *Torchinsky* v. *Siwinski,* 942 F.2d 257, 260 (4th Cir. 1991). Further explaining, the Fourth Circuit stated that "[d]iscretionary decisions by government actors inevitably impact the lives of private individuals, sometimes with harmful effects.... Holding police officers liable in hindsight for every injurious consequence of their actions would paralyze the functions of law enforcement." *Pinder* v. *Johnson,* 54 F.3d 1169, 1173 (4th Cir. 1995) (citing *Torchillsky* v. *Siwinski,* 942 F.2d 257, 260 (4th Cir. 1991).

As the United States Supreme Court stated in 1999, "[a] court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" *Wilson* v. *Layne,* 526 U.S. 603, 609 (1999) (quoting *Conn* v. *Gabbert,* 526 U.S. 286, 290 (1999). Thus, it is for this court to decide what right of the plaintiffs', if any, was violated and whether, at the time of the violation, the right was clearly established. The second step allows the court to determine whether the officers' actions were objectively reasonable. *See Pinder* v. *Johnson,* 54 F.3d 1169, 1173 (4th Cir. 1995) ("Important to this reasonableness inquiry is whether the rights alleged to have been violated were clearly established at the time of the challenged actions.") (citing *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982). As the Fourth Circuit stated in *Pinder*, "[I]f the law supporting the allegedly violated rights was not clearly established, then immunity must lie." *Id.*

1. Has the Plaintiff Alleged a Violation of an Actual Constitutional Right?

There can be little doubt that the constitutional right allegedly violated by the officers in this case is to be found, if

it is to be found anywhere, within the Fourth Amendment's guarantee of freedom from unreasonable search and seizure.[6] Specifically, the right at issue here could be described as the right to be free of a search conducted pursuant to a so-called "all persons" warrant, that is, a warrant that authorizes officers to conduct a full blown search of every person present at a location where criminal activity has allegedly been observed. Parenthetically, it is important to note at the outset what is not involved in this case. This case does not present the question of whether, for their own safety, police officers may conduct a limited pat down, during the course of the search, of all persons present at the scene of a premises search. That question, although touched on by the Supreme Court (in dictum) in *Ybarra* v. *Illinois,* 444 U.S. 85 (1979), has yet to be fully resolved and is not addressed here.[7] In addition, this case does not involve the well settled point of law allowing officers executing a search warrant for a residence to detain the occupants of the residence during the

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[6] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable: cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

[7] In *Ybarra* the United Stales Supreme Court stated the following:

> The *Terry* case created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain."... The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on the premises where an authorized narcotics search is taking place.

Ybarra v. *Illinois,* 444 U.S. 85, 93 (1979). For further discussion of this particular question, see WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.9(d) (3d ed. 1996).

execution of the warrant. *See Michigan* v. *Summers,* 452 U.S. 692 (1981) (holding that "a warrant to search for contraband found on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted").

The threshold question facing this court is whether police officers may validly obtain and execute a search warrant for "all persons" present at a locale, absent a showing of particularized probable cause to search each individual. Neither the United States Supreme Court nor the Fourth Circuit has specifically addressed the constitutionality of "all persons" warrants.[8]

The positions taken by various state jurisdictions and the few federal jurisdictions that have spoken on the subject can be roughly grouped into two categories. The first category is comprised of those jurisdictions that deem "all persons" warrants facially unconstitutional. The second category includes those jurisdictions that follow the standard expressed in the New Jersey case *State v. De Simone,* 288 A.2d 849 (N.J. 1972). *De Simone* and its progeny generally hold that although such warrants are not facially unconstitutional, they must be supported by particularized probable cause to search *each* of the individuals present at the site of the search. This may, of course, depend greatly upon the particular circumstances of the case such as the location of the search and the nature of the crime being investigated.

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[8] In *Ybarra* v. *Illinois,* 444 U.S. 85 (1979), the United States Supreme Court held unconstitutional the search of an individual pursuant to an Illinois statute that authorized law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant. The *Ybarra* Court specifically held open the constitutionality of "all persons" warrants stating that, "we need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search win be in possession of illegal drugs." *Id.* at 92 n.4.

As discussed below, this court rejects the view that "all persons" search warrants are facially unconstitutional, and adopts the *De Simone* standard. Moving to the second part of the inquiry, however, the court determines that on the facts of this case, where the informant reported seeing "a black male" dispensing contraband, there was no probable cause to strip search the females who were present at the scene, or those who happened upon the scene as the search was in progress.

a. "All persons" Warrants are Facially Unconstitutional

The jurisdictions that deem "all persons" warrants facially unconstitutional do so for one of two reasons. First, several jurisdictions hold that "all persons" warrants are simply not descriptive or specific enough to satisfy the language of the Fourth Amendment.[9] These jurisdictions reason that the language of the Fourth Amendment explicitly requires specificity and "all persons" warrants are just too broad.

Second, a few jurisdictions find "all persons" warrants unconstitutional because they all too closely resemble the general warrants and writs of assistance that gave rise to the Fourth Amendment.[10] The English colonists' experience with

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[9] *See United States v. Johnson,* 475 F.3d 977, 979 (D.C. Cir. 1973) (dictum) ("To obtain a warrant permitting the search of anyone found on the premises would ... appear to be unsupportable as lacking the particularity constitutionally required."); *People v. Tenne,,* 25 Cal App. 3d 16, 24, 101 Cal Rptr. 419, 423 (Ct App. 1972) (holding that "unidentified persons" warrant lacked reasonable particularity); *State v.* Wise, 284 A.2d 292, 294 (Del. Super. Ct. 1971) (holding "occupants" warrant insufficiently specific); *Johantgen v. Commonwealth,* 571 S.W.2d 110, 111-12 (Ky. Ct. App. 1978) (holding "any other person" warrant insufficiently specific); *People* v. *Jackson,* 446 N.W.2d 891, 893 (Mich. Ct. App. 1989) (holding "other persons" warrant lacked required particularity), rev'd on other grounds, *People* v. *Russo,* 487 N.W.2d 698, 706 n.32 (Mich. 1992).

[10] *See State v. Lewis,* 566 P.2d 678, 680 (Ariz. 1977) (dictum) (stating that search of persons only incidentally on premises and neither named nor described in warrant would be general warrant);

writs of assistance, which gave the British customs officials blanket authority to search for goods imported in violation of British tax laws, led to the adoption of the Fourth Amendment. *See Sanford v. Texas,* 379 U.S. 476, 482-86 (1965). General warrants, from which writs of assistance were derived, were used in 17th and 18th century England to stifle the presses. *See Marcus v. Search Warrant of Property,* 367 U.S. 717, 726-27 (1961). For example, one such warrant empowered the Surveyor of the Press to "seize all seditious books and libels and to apprehend the authors, contrivers, printers, publishers, and dispersers of them," and to "search any house, shop, printing room, chamber, warehouse, etc. for seditious, scandalous or unlicensed pictures, books, or papers, to bring away or deface the same." *Id.* at 726 (quoting SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776, at 254 (citing Entry Book 5 at 177)). While suppression of the presses through the use of general warrants was judicially outlawed in 1765 when Lord Camden declared their use contrary to the common law in the case *Entick v. Carrington,* 19 How. St. Tr. 1029 (1765),[11] the use of such warrants had forever changed the American legal landscape.

b. The De Simone *Standard*

In addition to a majority of state jurisdictions,[12] all of the federal jurisdictions that have addressed the constitutionality

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State v. Cochran, 217 S.E.2d 181, 183-84 (Ga. Ct. App. 1975) (holding a "persons" warrant is a general warrant); *Crossland v. State,* 266 P.2d 649, 651 (Okla. Crim. App. 1954) (holding that, based on state constitution, "every person" warrant is a general warrant).

[11] The United States Supreme Court has called *Entick* v. *Carrington* "one of the landmarks of English liberty." *Boyd v. United States*, 116 U.S. 616, 626 (1886).

[12] For a comprehensive survey of state jurisdictions' treatment of "all persons" warrants as of 2001, see *United States v. Guadarrama,* 128 F. Supp. 2d 1202, 1207-1209 (E.D. Wis. 2001) (finding that 26 state jurisdictions use the *De* Simone standard or have implicitly adopted it).

of "all persons" warrants have adopted, either explicitly or implicitly, the *De* Simone standard established in *New Jersey v. De Simone,* 288 A.2d 849 (N.J. 1972).[13] In *De Simone,* New Jersey local authorities, after receiving and investigating a tip from the Federal Bureau of Investigation, determined that a certain group of automobiles were being used as "drops"[14] for lottery slips. *Id.* at 851. The authorities

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[13] *See Marks v. Clarke,* 102 F.3d 1011, 1029 (9th Cir. 1996) ("a warrant to search 'all persons present' for evidence of a crime may only be obtained when there is reason to believe that all those present will be participants in the suspected criminal activity"); *United States v. Shields,* No. 98-3059, 1999 U.S. App. LEXIS 2496, at *6-*9, 1999 WL *76890,* at *3) (10th Cir. Feb. 18, 1999) (holding that the validity of an "all persons" warrant hinged on whether there was "probable cause to believe all those present possessed evidence of criminal activity"); *Williams* v. *Kaufman County,* No. 3:97-CV-O875-L, 2002 U.S. Dist. LEXIS 5555, at *11-*16, 2002 WL 519814, at *4-*5 (N.D. Tex. Mar. 29, 2002) (holding that "all persons" search warrant was unconstitutional when executing officers admitted at trial that "they had no evidence to support their belief or suspicion that the individual plaintiffs ... were in possession of weapons or contraband"); *United States v. Guadarrama,* 128 F. Supp. 2d 1202, 1210-12 (E.D. Wis. 2001) (holding an "all persons" warrant for a tavern unconstitutional under the *De Simone* standard); *United States v. Smith,* No. 0O-40118-0l/03-SAC, 2001 U.S. Dist. LEXIS 6380, at *27-*30, 2001 WL523371, at *9-*10 (Kan. Apri126, 2001); *United States v. Graham,* 563 F. Supp. . 149, 151 (W.D.N.Y 1983) (admitting evidence seized pursuant to an "all persons" warrant because the supporting affidavit established probable cause to search all persons found in the named duplex).

[14] The *De* Simone court described the use of "drop" cars as follows:

> By evident prearrangement, other vehicles came in quick succession, stopping near the car, the drivers then dropping brown paper bags into it. Some pickup men approached the parked vehicle on foot and made like deposits. ... [T]he appointed place for rendezvous was changed daily to different intersections within the city.

subsequently obtained search warrants authorizing the search of these cars. One of the cars, the one in which De Simone was a passenger, was registered to Wilson D' Alessandro and the search warrant for that car authorized the authorities to search the specifically described automobile "and all persons found therein." *Id.* at 850-51. The officers executed the warrant and discovered lottery slips on De Simone. *Id.* at 851-52. After the trial court refused to suppress the evidence, De Simone was convicted of possession of lottery slips. *Id.* at 850. De Simone appealed to the Appellate Division, which reversed, holding that the police had insufficient grounds to search the *individuals* in the car, notwithstanding the grounds the officers had to search the car itself. *Id.* at 850. The state appealed to the Supreme Court of New Jersey, which reversed the judgment of the Appellate Division and affirmed the conviction of De Simone. *Id.* at 854.

The Supreme Court of New Jersey found that the probable cause to search the automobile extended to all the individuals in the automobile. First, the New Jersey court noted that probable cause extended to the driver because the driver "of course had to be involved." *Id.* at 852. As for the passengers, the court found that probable cause extended to them for two reasons:

> First, a driver would not likely bring or be permitted to bring an uninvolved person who would witness the deposit of like objects by the others who were expected to converge at the appointed time. The second reason is that during the surveillance some of the pickup men had been observed to come on foot, and hence it would not be surprising, depending on the location for a particular day, that a pickup man would be given a lift.

Id. The court, explaining the importance of evaluating the warrant in the context of the particular criminal enterprise,

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De Simone, 288 A.2d at 851.

noted that "[a] warrant must be read realistically in the light of the proof upon which it was issued." *Id.* The court concluded that the search of De Simone was constitutional because there existed probable cause to believe the passengers "would be involved in the criminal operation," and the passengers' "presence in the car at the place of the criminal rendezvous satisfied the requirement for specificity in the Fourth Amendment." *Id.* at 854.

The only federal appeals court to have applied the *De Simone* standard, the United States Court of Appeals for the Ninth Circuit, applied it in a case that proves particularly illuminating because of its similarity to the case before this court. In *Marks v. Clarke,* 102 F.3d 1012 (9th Cir. 1996), the Ninth Circuit addressed the constitutionality of "all persons" warrants issued to search two Spokane, Washington residences. After Spokane police officers conducted an extensive investigation of a group of individuals suspected of purchasing large amounts of stolen property, the officers obtained search warrants authorizing the search of two residences. *Id.* at 1019. In addition to the residences, the warrants authorized the officers to search two named males and any other persons present. *Id.* The authorization to search "all persons" for evidence was granted despite the fact that the affidavit submitted with the warrant application requested only authorization to search two named individuals and all others present "for officer safety." *Id.*

Several officers executed the warrants and obtained over six hundred items of personal property and $1.6 million in cash. *Id.* at 1022. Although the exact number of individuals subjected to a search of their person was disputed, it was undisputed that many, including women and children, were searched during the execution of the warrants. *Id.* After approximately two years of litigation over whether the search and seizure were constitutional, the trial court ultimately suppressed all of the seized evidence, ordered the return of all the confiscated property, and dismissed the underlying criminal charges. *Id.* at 1023. The State of Washington

appealed the order as to the return of the property and the dismissal of the criminal charges, but did not appeal the suppression of the evidence. *Id.* The Washington Supreme Court reinstated the criminal charges and remanded the case to the trial court for determination of who should receive the disputed property. *Id.* All of the criminal charges were eventually dismissed or reduced. *Id.*

Three years after the search, the Markses instituted two civil rights actions in federal court against the City of Spokane, Spokane County, and various individual defendants. *Id.* at 1023-24. The district court held that the warrant in question was unconstitutional for two reasons. First, the district court found that the warrant was a "general warrant" and failed to comport with the Fourth Amendment's requirement that warrants describe with particularity the items to be seized. *Id.* at 1024. Second, the district court found that the authorization to search all persons at the residences violated the Fourth Amendment because it was not supported by probable cause individualized to each person. *Id.* The district court denied all of the defendants qualified immunity[15] and granted summary judgment to plaintiffs on the issue of liability finding that, with respect to the officers that obtained the warrant, their failure to "constant[ly] reference" the warrant during the search was unreasonable, and with respect to the officers executing the search, they were executing a "general" warrant and thus were not entitled to qualified immunity. *Id.* at 1024-25.

The Ninth Circuit upheld the denial of qualified immunity but for reasons different than those cited by the district court.

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[15] The standard for qualified immunity in the Ninth Circuit, while worded differently than the Fourth Circuit standard outlined in *Pritchett* v. *Alford,* has similar requirements. The analysis used by the Ninth Circuit involves two questions: "(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Act Up!/Portland v. Bagley,* 988 F.2d 868, 871 (9th Cir. 1993).

With respect to the officers that sought and obtained the warrant, the Ninth Circuit held that their motion for qualified immunity must be denied because the officers unreasonably obtained and executed a warrant to search all persons present for *evidence. Id.* at 1025. Specifically, the court held that warrant was obtained unreasonably because the affidavit that supported the warrant "not only was lacking in any indicia of probable cause to search *all* persons but itself requested permission only to search two persons ... for evidence of the crime under investigation ... and all others *solely for officer safety.*" *Id.* (second emphasis added).

In support of this line of argument, the Ninth Circuit quoted the Supreme Court case *Ybarra* v. *Illinois,* 444 U.S. 85 (1980). The Court in *Ybarra* held that:

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided simply by pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91. The Ninth Circuit acknowledged that the *Ybarra* Court did not directly address the constitutionality of "all persons" warrants but found that this small void in the Supreme Court's definition of the contours of the Fourth Amendment arose only when the warrant was "supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of [items subject to seizure]." *Marks v. Clarke,* 102 F.3d 1012, 1027 (1997) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 92 n.4 (1980)). In other words, the *Marks* court found that while the Supreme Court in *Ybarra* did not address whether "all persons" warrants are constitutional when there exists particularized probable cause to search each individual, there is no question that "all persons" warrants are *unconstitutional* in the absence of the requisite particularized probable cause.

As for the officers that executed the warrant but had no

role in procuring it, the Ninth Circuit examined the facts surrounding the search and asked whether particularized probable cause existed to search all of the persons present. The Ninth Circuit found that, as to everyone except the two named individuals, probable cause to search "all persons present" for evidence was lacking. *Id.* at 1027-28. The state argued that an "all persons" warrant was reasonable in this instance because "[u]nder the facts and circumstances confronting the officers, they justifiably concluded they were in a 'den of theives.'" *Id.* at 1029. The Ninth Circuit responded to this argument by characterizing it as "simply a more sophisticated and beguiling version of the kind of justification forbidden by *Ybarra*..."[16] and repeating that regardless of what the officers were confronted with, "a warrant to search 'all persons present' may only be obtained when there is reason to believe that all those present will be participants in the suspected criminal activity." *Id.* The Ninth Circuit concluded that the officers could not have reasonably believed everyone at the residences was involved in criminal activity because "[h]ere, as we have noted, ...large numbers of family members, including children, were, as the officers might have anticipated, present before and during the search." *Id.* The court stated, however, that an "all persons present" warrant "might be appropriate for a different kind of locale—one dedicated exclusively to criminal activity—for example, a building or apartment used as a crack house, a barn used as a methamphetamine lab, or a warehouse used exclusively as a storage place for arms." *Id.* The court then explicitly adopted the *De Simone* standard and quoted that case as stating that:

> A showing that lottery slips in a department store or an industrial plant obviously would not justify a warrant to search every person on the premises, for there

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[16] "Persons detained during a search for evidence cannot be searched according to *Ybarra* simply because they are there." *United States* v. *Vaughn,* 718 F.2d 332, 335 n.7 (9th Cir. 1983).

> would be no probable cause to believe that everyone there was participating in the illegal operation. On the other hand, a showing that a dice game in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that it is likely that everyone present is a party to the offense.

Id. (quoting *State v. De Simone,* 288 A.2d 849, 850 (N.J. 1972); and citing 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.5(e), at 546 (3d ed. 1996) (endorsing the limited rationale outlined in *De Simone* as the proper analysis for "all persons present" warrants)). In conclusion, the court found that based on the *De Simone* standard and in light of the facts and circumstances surrounding the search, the warrant's authorization to search "all persons present" was unconstitutional.

Having established the unconstitutionality of the warrant, the court then sought to determine whether the executing officers were protected by qualified immunity. The court explained that "[n]otwithstanding the warrant's invalidity, [the officers] who searched the various plaintiffs are nevertheless entitled to rely on the warrant, and will not be stripped of qualified immunity, as long as their reliance is objectively reasonable." *Id.* at 1028 (citing *United States* v. *Leon,* 468 U.S. 897, 920-921 (1984)). The court then explained their rationale for denying the defendants qualified immunity.

> In this case, if the overbreadth of the warrant with respect to searching "any person present" was not immediately apparent at the pre-search briefing session, its invalidity certainly became apparent, at the latest, when the officers were confronted with the duty of searching dozens of people, including children, even the point of "inspecting" the diaper of an infant. In whatever limited circumstances a blanket "any person present" warrant might serve *Ybarra's* dear requirement of "probable cause particularized with

> respect to [each] person," the circumstances of the execution of this warrant made it unreasonable for an official to believe that it was not facially overbroad.

Id. at 1029 (quoting *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979)) (internal cites omitted).

Having established that "all persons" warrants are unconstitutional when used without probable cause to believe "all persons" are involved in criminal activity, the next question is whether the "all persons" warrant used in the case before the court was unconstitutional as executed. In other words, was the "all persons" warrant in the case supported by probable cause to search the occupants of the residence at 1116 Tree Street?

A quick review of the basic facts provides context. The alleged illegal activity in this case was drug dealing. The confidential informant told officer Maldonado that he had seen a black male, in his late teens or early twenties distribute cocaine from the residence at 1116 Tree Street. Based on this information, officers Maldonado and Kight drafted a search warrant and affidavit. Under the headline "REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES," the affidavit stated that:

> Within the past 72 hours a confidential and reliable informant has observed cocaine distributed from the location to be searched. The informant is reliable in that it has provided information of [sic] on at least four occasions that has lead to at least four arrest and seizure [sic] of illegal drugs. Through the affiant's and other Richland County Sheriff's Department Narcotic officer [sic] experience in drug enforcement, it is known that subjects present at the scene of illegal drug distribution and/or possession [sic] commonly have drugs in their possession an [sic]

The operative question is, based on this affidavit, did Officers Kight and Maldonado have probable cause to believe "all persons" present at 1116 Tree Street would be involved in criminal activity? This court finds that there was insufficient

particularized probable cause to search "all persons" present at 1116 Tree Street in the context of the facts presented in this case. Thus, this "all persons" warrant violated the Fourth Amendment.

The court comes to this conclusion based on the rationale of *Ybarra* and *Marks* as applied to the facts of this case. While the *Marks* case from the Ninth Circuit is not binding on this court, its factual similarity to this case makes it particularly persuasive. Regardless of the Ninth Circuit's reasoning in *Marks*, however, this court believes the "all persons" warrant in this case is unconstitutional based on the teachings of *Ybarra.* The *Ybarra* Court stated clearly that "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person.*" *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979) (emphasis added). The warrant in this case is not particularized to anyone. Despite the fact that the confidential informant told officer Maldonado he observed a black male in his late teens or early twenties selling drugs from the residence, the search warrant does not articulate particularized probable cause to search *any* specific individual.

Because the warrant failed to describe any particular individual, the only rationale remaining to support a claim of particularized probable cause would be that the individual's proximity to the alleged activity gave rise to the requisite probable cause. In other words, probable cause existed to search all persons at 1116 Tree Street because, due to their proximity to the alleged drug dealing, they must be involved in it. This court finds the connection between proximity to crime and involvement in crime too tenuous to support a warrant as broad as the "all persons" warrant of this case.[17]

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[17] This does not mean that proximity to crime can never create the sufficient probable cause to search. *See State* v. De *Simone,* 288 A.2d 849, 850 (1972) ("[A] showing that a dice game in a manhole or in a barn should suffice [to create probable cause], for the reason

See Ybarra v. *Illinois,* 444 U.S. 85,91 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").

One might argue that the fact that the location in this case was a residence, as opposed to a tavern as in *Ybarra,* militates toward a finding of probable cause under the theory that the inhabitants of a residence are aware and often involved in one another's activities. In addition, because residences are, by definition, not public places, the risk of the executing officers searching members of the public that have no relation whatsoever to the alleged suspects is minimized. Though the risk of searching uninvolved individuals is minimized, it is not eliminated. As the New Jersey Supreme Court stated in *De Simone,* "[i]n the case of a dwelling, there is a great likelihood that an innocent person could happen to visit the occupant." 288 A.2d 849, 851 (1972). The Ninth Circuit held in *Marks* that "all persons" warrants for residences are never constitutional for "a raid on any family home where innocent family members or friends might be residing or visiting." *Marks* v. *Clarke,* 102 F.3d 1012, 1029 (9th Cir. 1997). *See also United States* v. *Guadarrama,* 128 F. Supp. 2d 1202, 1212 n.14 (2001) ("It is worthy of note that *De Simone's* standard does not automatically authorize 'all persons' warrants for non-public places, *especially private residences.")* (emphasis added).

Finally, at common law, the home has always been afforded special protection. *See Semayne's Case,* 77 Eng. Rep. 194, 195 (K.B. 1603) ("[T]he house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223 (1765-1769) ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles

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that the place is so limited and the illegal operation so overt that it is likely that everyone present is party to the offense.").

it his castle, and will never suffer it to be violated with impunity..."); *see also United States v. United States District Court,* 407 U.S. 297, 313 (1972) ("Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

In conclusion, because the "all persons" warrant in the present case was unsupported by probable cause particularized to the individuals that were searched, the warrant was invalid under the Fourth Amendment. The officers could, consistent with the Constitution, detain all occupants for the officers' safety and to protect the integrity of the search scene while the execution of the warrant progressed. They could not, however, conduct extensive strip searches of all persons present, including strip searches of the females on the scene.

2. *Was the Right Clearly Established at the Time of the Violation?*

The next question in determining whether the defendants in this case should be afforded qualified immunity is whether, at the time of the violation, the right violated by the defendants was clearly established. When determining whether a reasonable officer should have been aware of a constitutional right, courts do not impose on the official a duty to sort out conflicting decisions or to resolve subtle or open issues. As the Fourth Circuit has observed, "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines," *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir. 1992).

At this stage, how the plaintiffs' rights are defined, specifically, the level of abstraction used in defining the plaintiffs' rights, is crucial to the integrity of the analysis. The qualified immunity analysis is undermined if the right that was violated is defined broadly without reference to the material facts of the case. For example, the qualified immunity analysis would be meaningless if, at this stage, the court defined the right that was violated as the right to be free from unreasonable searches and seizures. This articulation of

the right fails to incorporate any meaningful description of the officer's actions and guarantees a denial of qualified immunity regardless of the reasonableness of those actions. As the Fourth Circuit stated in *Anderson* v. *Creighton,* 483 U.S. 635 (1982), "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense ...." *Id.* at 640. In the present case, this court finds the right at issue is best defined as the right to be free from searches and seizures conducted pursuant to "all persons" search warrants where the search warrant is unsupported by particularized probable cause to search all persons.

Thus, this court must determine whether the contours of the Fourth Amendment were sufficiently clear at the time of the search to make it plain to reasonable officers that their actions violated the plaintiffs' rights. Based on the lack of Supreme Court and Fourth Circuit precedent dealing directly with "all persons" warrants and the muddled line delineating the constitutional and unconstitutional use of "all persons" warrants, this court finds that the right to be free of unconstitutional "all persons" warrants was not sufficiently clear at the time of the violation for the defendants to be stripped of qualified immunity.

The court acknowledges that the plaintiffs' Section 1983 claim is not doomed merely because neither the Supreme Court nor the Fourth Circuit has addressed the specific issue of "all persons" warrants. The lack of appellate comment in this case is one factor contributing to this court's conclusion that the right was not clearly established. The other contributing factor is the fine line between the constitutional and unconstitutional use of "all persons" warrants.[18] While

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[18] As the United States Supreme Court stated in *Anderson* v. *Creighton:*

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is

the *De Simone* standard effectively restricts the use of "all persons" warrants, it does not foreclose their use all together. Again the necessary inquiry focuses on the particularized probable cause and in this case, the court finds the call was too close to warrant denying the defendants qualified immunity.

IV. Conclusion

Although this court finds the warrant executed on 1116 Tree Street on June 8, 2000 unconstitutional, the court also finds that the right violated—the right to be free of unconstitutional "all persons" warrants—was not clearly established at the time of the violation. Thus, the defendants are granted qualified immunity with respect to the plaintiffs' civil rights claim under 42 U.S.C. § 1983. The remaining state claims are remanded to state court.

IT IS SO ORDERED.

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protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent.

483 U.S. 635, 639 (1987).

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(2)

No. 04-516

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

LESHIA DONALDSON, ET AL.,

Petitioners,

v.

LEON LOTT, RICHLAND COUNTY SHERIFF, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENTS

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REASONS FOR DENYING THE PETITION

I. The circuit conflicts cited by the Petitioners are insignificant, if they exist at all, and as a result, a writ of certiorari is not warranted.

The Petitioners maintain that this case presents this Court the opportunity to resolve two circuit conflicts. The Respondents disagree for several reasons. First, as to be discussed further below, any perceived conflict in the reading and application of footnote four contained in this Court's decision in *Ybarra v. Illinois*, 444 U.S. 85 (1979), does not warrant a writ of certiorari to be issued in this case. Furthermore, in the event that the circuit conflicts presented by the Petitioners are viewed as critical, this is clearly not the case for a resolution of those conflicts or to answer any unresolved questions from *Ybarra* due to the current posture of the case.

Addressing the second point initially, it is important for this Court to focus on the fact that the unconstitutionality of the "all persons" search warrant at issue has not been conclusively determined -- despite the assertion to the contrary by the Petitioners. The district court did not address the constitutionality of the searches by way of trial or even on cross motions for summary judgment. Instead, the Respondents alone moved for summary judgment, and as a result, all facts have been *to this point* viewed in a light most favorable to the Petitioners. The Fourth Circuit recognized that it was not deciding the unconstitutionality of the search warrant as a matter of law. Instead, the Court "decide[d] whether the facts, *viewed in a light most favorable to plaintiffs*, establish that defendants' search of plaintiffs pursuant to the 'all persons' language in the warrant was unreasonable under the Fourth Amendment." *Owens v. Lott*, 372 F.3d 267, 273 (4th Cir. 2004). (Emphasis added). Thus, even though the district court and the Fourth Circuit found that the "all persons" language was unconstitutional, it did not make that determination as a matter of law. The legality of the warrant and whether probable cause exists for the issuance of that warrant are issues remaining to be litigated.

Consequently, the Petitioners are flat wrong when they

maintain that "both courts below squarely held that the 'all persons' search in this case was unconstitutional." *See*, Petition for Writ of Certiorari, p. 28. Those courts were only viewing the evidence in a light most favorable to the Petitioners and, in fact, were troubled by the paucity of facts contained in Deputy Maldonado's warrant application. There was no testimony or evidence presented at summary judgment by affidavit or deposition as to the additional information, if any, as was provided orally to the issuing magistrate when the warrant was sought. That testimony will need to be developed in future proceedings, which as the case currently stands, will take place in state court in adjudication of the remaining state law claims that were remanded by the district court to state court. Pet App. 21a. Because the existence of probable cause or lack thereof has not been conclusively determined, this case is not an appropriate avenue for this Court to attempt to resolve the perceived circuit conflicts cited by the Petitioners.

Moreover, given the posture of this case, both the district court and the Fourth Circuit did not find it necessary to address whether the searches were constitutional in spite of the alleged illegality of the "all persons" language contained in the warrant. The courts below ruled, based on the evidence taken in a light most favorable to the Petitioners, that the searches were not supported by individualized probable cause. Yet, as the Respondents continue to maintain, the searches were constitutional even in the absence of probable cause. Even if probable cause did not exist for the searches of these persons, it has been conceded that probable cause, as determined by a neutral and detached magistrate, did support the search of the premises itself. As a result, the frisk searches in execution of the search warrant were constitutionally permitted for purposes of ensuring officer safety. *See*, *Michigan v. Summers*, 452 U.S. 692 (1981); *Maryland v. Buie*, 494 U.S. 325 (1990).

The constitutionality of the searches in the present case, and in particular the frisk search of William Clayton, is supported by the case of *State v. Guy*, 172 Wis. 2d, 492 N.W.2d 311 (1992), *cert. denied*, 509 U.S. 914 (1993). That case is particularly significant given that this Court denied certiorari, with Justices White and Thomas dissenting. *See*, *Guy v. Wisconsin*, 509 U.S. 914 (1993). In that case, the Wisconsin Supreme Court concluded that an officer's frisk of a person present during the execution of a narcotics search

warrant was constitutional under *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. The court found that, given the nature of a search for narcotics and the violence typically associated with drug trafficking, it was reasonable for a police officer to conduct a search for weapons.[1] Justices White and Thomas also recognized that "[o]ther state courts have upheld patdown searches of persons encountered during the execution of a narcotics search warrant in a private residence on the same rationale [as the Wisconsin court]." *Guy*, 509 U.S. at 914.

Clearly, the extent of the search of William Clayton was a patdown for weapons, which would certainly be constitutional under *Terry*. Moreover, the scope or extent of the searches of the three female Petitioners remains in dispute. Deputy Kight testified that no clothing was removed, and she described the searches as "frisk searches." The courts below construed the searches as "strip searches" because the evidence on summary judgment must be viewed in a light most favorable to the Petitioners as the non-moving parties. Yet, as this discussion shows, there remain issues of fact in dispute on the ultimate issue of the searches' constitutionality that will make it very difficult for this Court to clearly and cleanly resolve any perceived circuit conflicts.

With that said, the Respondents further submit that there is no substantial conflict that requires this Court's intervention. The Ninth Circuit in *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996), reads the *Ybarra* decision as setting forth a clearly established rule that a search warrant must be supported by probable cause: There is no disagreement from the Fourth Circuit or the Respondents to

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[1] The Fourth Circuit has likewise found that there is a strong correlation between drugs and the presence of weapons. *See*, *United States v. Grogins*, 163 F.3d 795, 799 (4th Cir. 1998) ("the connection between illegal drug operations and guns in our society is a tight one"); *United States v. White*, 875 F.2d 427, 433 (4th Cir. 1989) ("it is not unreasonable to recognize that weapons have become tools of the trade in illegal narcotics operations"); *United States v. Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) ("the law has uniformly recognized that substantial dealers in narcotics possess firearms and that entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers").

that proposition. However, the *Ybarra* Court did not address whether an "all persons" search warrant where the persons are unnamed is constitutional and, if so, under what circumstances. That was the point made by the Fourth Circuit in applying the qualified immunity analysis in this case. There is no dramatic or significant conflict identified here. It is clear that this Court in *Ybarra,* in fact, carefully limited the scope of its decision as follows:

> Consequently, we need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs.

444 U.S. at 92, n.4. Thus, the *Ybarra* decision does not determine whether an "all persons" search warrant is constitutional or not where the authorization to search unnamed persons present is included on the warrant, which is the scenario in the present case. Moreover, this Court clearly did not address in *Ybarra* what is required to show probable cause for such an "all persons" search warrant.

Of course, it is ironic that the Petitioners' argument that the Fourth Circuit's and Ninth's Circuit's interpretations of footnote four of the *Ybarra* decision are "irreconcilable" and create a conflict worthy of a writ of certiorari. For, if the distinguished judges of those two courts cannot agree on what the footnote proclaims as the applicable law, it only demonstrates that the law is not clearly established such that a reasonable law enforcement officer in the position of Deputy Maldonado should understand the holding of *Ybarra.* As this Court aptly observed in *Wilson v. Layne,* 526 U.S. 603 (1999), "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S. at 618. The alleged circuit conflict cited by the Petitioners only serves to confirm that the Respondents are entitled to qualified immunity because the applicable law was not clearly established.

The Petitioners also suggest that there is a circuit conflict between the Fourth Circuit and the Third and Fifth Circuits. The

Respondents respectfully disagree. The Third Circuit case of *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), is easily distinguishable from the present case. In *Doe*, the warrant application sought the authority to search "all occupants" of a suspected drug house, but in issuing the warrant, the magistrate only permitted the search of a single, identified individual (given the name "John Doe" in the opinion). The warrant did not authorize the search of "all persons" nor did it authorize the search of John Doe's wife and child, who ultimately were strip searched during the execution of the warrant. Hence, the facts alone demonstrate that there is no conflict between the Fourth Circuit and the Third Circuit. Moreover, the Petitioners' suggestion that the denial of qualified immunity in *Doe* suggests that the Third Circuit would not have granted qualified immunity in the present case is unfair as well as speculative. The *Doe* court denied qualified immunity because it was clear that the warrant did not authorize the searches of two persons not named in the warrant *and* because it was clear that police could not broaden the scope of a warrant with an unincorporated affidavit. Obviously, the qualified immunity analyses in *Doe* and in the present case are not remotely similar.

As for the perceived conflict with the Fifth Circuit, the Respondents do not read *Williams v. Kaufman County*, 352 F.3d 994 (5th Cir 2003), as being in conflict with the Fourth Circuit's opinion in the present case. Like *Doe*, as discussed above, *Williams* is factually distinguishable from the present case. There, as in *Doe*, the warrant did not authorize the searches of "all persons" present at the execution of the warrant. The warrant expressly allowed for the "seizure" -- not search -- of each suspected party named in the warrant affidavit. None of the plaintiffs, however, was named as a suspect in the warrant affidavit. Moreover, as in *Ybarra*, the search warrant was for a public place -- a night club -- and not for a private residence as in the present case. Consequently, the facts of *Williams* were on point with *Ybarra* so as to preclude qualified immunity for the searches of the night club patrons not named in the warrant.

In sum, the Respondents disagree with the Petitioners' suggestion that the Fourth Circuit's decision in this case is at odds with decisions of other circuits. Accordingly, it is submitted that a writ of certiorari is not warranted. Even if further analysis of the *Ybarra* decision is needed or this Court finds it prudent to weigh in on the constitutionality of "all persons" search warrants, this case -- as opposed to a criminal case -- is not in the best posture for such a

determination given the material issues of fact remaining in dispute and the incomplete record of which the Fourth Circuit complained.[2]

II. This Court has already provided guidance on the role of out-of-circuit authority in determining whether the law is clearly established for purposes of a qualified immunity analysis, and as a result, a writ of certiorari is not warranted.

As a secondary issue, the Petitioners ask this Court to grant certiorari to address the role of out-of-circuit authority in determining whether the law is clearly established for purposes of a qualified immunity analysis. In making this argument, the Petitioners suggest that the approach by the Fourth Circuit was erroneous. In actuality, the rule applied by the Fourth Circuit in this very case is consistent with existing precedent of this Court. In *Wilson v. Layne*, 526 U.S. 603 (1999), a case which originated in the Fourth Circuit, this Court affirmed the grant of qualified immunity. This Court explained that,

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.

526 U.S. at 617. Consequently, this Court previously adopted the same approach applied by the Fourth Circuit in the case at bar. To determine whether the law is clearly established, the Court looks first to the controlling authority within the relevant jurisdiction. In the absence of such controlling authority within that jurisdiction, the law may be deemed clearly established *only if* there exists a "consensus of cases of persuasive authority" from other

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[2] It bears repeating that the material issues of fact in dispute did not preclude summary judgment on the qualified immunity defense only because even with the evidence viewed in a light most favorable to the Petitioners, the Respondents were entitled to summary judgment.

jurisdictions. The requirement of a consensus is crucial -- unless there is such a consensus it cannot be said that the unlawfulness of the officer's actions was apparent.

Importantly, in *Wilson, supra*, this Court affirmed the decision of the Fourth Circuit. In *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998), the Fourth Circuit held that "[t]he law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." 141 F.3d at 114. That is the same approach taken by the Fourth Circuit in the present case. Consequently, it is not necessary for this Court to grant certiorari only to reaffirm what has already been stated by this Court in *Wilson*.

The Petitioners also maintain that there is split of authority as to how the circuits apply the "consensus of cases of persuasive authority" from other jurisdictions. They suggest that the Fourth Circuit, unlike other circuits, looks at the legal test to be employed and not the ultimate outcome of the legal tests. This contention represents nothing more than a misunderstanding of the Fourth Circuit's ruling in the present case. The Petitioners fail to recognize that the different legal tests for determining if probable cause exists to support an "all persons" search warrant can and do effect the ultimate outcome. Prior to this case, neither the Fourth Circuit nor the South Carolina appellate courts had had the opportunity to address the constitutionality of an "all persons" search warrant or the showing required for the issuance of an "all persons' search warrant. Moreover, none of the courts providing controlling authority for South Carolina had previously determined the propriety of "all persons" search warrants and, in particular, the use of such warrants with respect to a residence where suspected drug activity was occurring. Thus, where as here the proper legal test effects the outcome, it was entirely appropriate for the court to focus on the fact that the legal test to be applied is not clearly established in determining that qualified immunity is appropriate.

The Petitioners have also overlooked that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*

v. Katz, 533 U.S. 194, 202 (2001). In the absence of controlling authority, an objectively reasonable officer in Deputy Maldonado's position could have believed that probable cause existed for the search of all persons found on the premises. Each of the persons who were searched had a substantial connection to the premises. They did not appear to be present only by happenstance. The illegal drug activity witnessed by the informant had very recently occurred. The warrant was executed on the same day as the criminal activity was observed. The premises was a small, private residence, and none of the Petitioners were mere transitory visitors. Deputy Maldonado knew that the cocaine was being sold in an expeditious manner. Consequently, it was reasonable, although perhaps mistaken, to believe that the residents were involved in or had knowledge of the criminal activity so as to warrant the searches.

Moreover, it may not be ignored that a judicial officer had issued the "all persons" warrant in question, which also reinforces the Respondents' entitlement to qualified immunity. There is no suggestion that the magistrate who issued the warrant was provided false or incomplete information; yet, based on the very same information on which Maldonado relied, the magistrate issued the warrant and authorized the searches of all persons present at the execution of the warrant. The fact that the warrant was issued compels the conclusion that the law was not clearly established at that time and that the Respondents could not have reasonably known that their conduct in executing the warrant was unlawful.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Columbia, South Carolina
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Leon Lott, Richland County Sheriff, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari demonstrated that this case presents two important and recurring questions on which the lower courts are split. First, did this Court's decision in *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), clearly establish the unconstitutionality of "all persons" searches in the absence of probable cause to search each individual? The Third, Fifth, and Ninth Circuits have held that it did. The Fourth Circuit in this case held that it did not. See Pet. 9-17. Second, how should out-of-circuit precedent be used in determining whether government officials are entitled to qualified immunity? Two circuits have held that it should not be used at all. Six other circuits have taken a results-oriented approach, asking whether out-of-circuit authority clearly establishes the unconstitutionality of particular conduct. The Fourth Circuit in this case has taken yet a third approach, looking to whether there is a uniform verbal formulation of the legal rule rather than to whether there would be consensus among the cases on the constitutionality of respondents' conduct. See *id.* 22-29. The large number of decisions in which the courts have been called on to decide the constitutionality of "all persons" warrants demonstrates that this Court's guidance is required. See *id.* 18-22. Respondents' arguments for nonetheless denying certiorari lack merit.

I. Certiorari is Warranted to Resolve the Circuit Conflict over Whether *Ybarra* Clearly Established the Unconstitutionality of "All Persons" Searches in the Absence of Individualized Probable Cause.

A. In *Ybarra*, this Court expressly held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person" and that the requirement to show probable cause "cannot be undercut or avoided simply by pointing to the fact that coincidentally there exists probable

cause * * * to search the premises where the person may happen to be." 444 U.S. at 91. Both before and since *Ybarra*, there has been virtual unanimity among the lower courts that "all persons" searches like the one conducted in this case violate the Fourth Amendment. See Pet. 9-13 (describing the decisions of the Third, Fifth, and Ninth Circuits); *id.* 18-21 (citing decisions as early as the 1970s by state supreme and intermediate appellate courts). In this case, the Fourth Circuit embraced the consensus view and held that respondents' conduct violated the Fourth Amendment.[1] The "only justification" respondents gave the magistrate for issuing an "all persons" warrant was the assertion "that subjects present at the scene of [an] illegal drug distribution * * * commonly have drugs in their possession." Pet. App. 12a (brackets and ellipses in original). Respondents thus relied entirely on the "propinquity" presumption decisively rejected in *Ybarra*. Indeed, respondents' own argument perfectly illustrates this point, as they maintain that the warrant was valid because the "illegal drug activity witnessed by the informant" had occurred "on the same day" and "[t]he premises was a small, private residence." BIO 8.

Respondents seek to avoid the force of *Ybarra* by noting that *Ybarra* reserved judgment on the constitutionality of a warrant that "authorizes the search of unnamed persons in a place *and is supported by probable cause* to believe that *persons* who will be in the place at the time of the search *will be in possession of illegal drugs*." BIO 4 (quoting *Ybarra*, 444 U.S. at 92 n.4 (emphases added)). This argument fails for the reason set forth in the petition, which respondents simply ignore: the scenario hypothesized in the *Ybarra* footnote differs materially from the recurring factual scenario

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[1] To be sure, both the district court and the court of appeals analyzed the question by taking the facts in the light most favorable to petitioners. Cf. BIO 1-2. But as this Court has repeatedly stated, that is the appropriate method in assessing claims of qualified immunity. See *infra* at 9.

exemplified by this case. Here, the "all persons" warrant was *not* supported by probable cause with respect to each petitioner. Respondents' contention that mere propinquity is sufficient to establish probable cause simply guts *Ybarra*'s actual holding. See Pet. 14-17.

B. Although it is plain that respondents' conduct violated the Fourth Amendment,[2] there is a square conflict over whether respondents are nonetheless entitled to qualified immunity. The Ninth Circuit in *Marks* v. *Clarke*, 102 F.3d 1012 (CA9 1996), *cert. denied*, 522 U.S. 907 (1997), held, on indistinguishable facts, that defendant-officers were not entitled to qualified immunity. See Pet. 9-11. Respondents attempt to answer the stark conflict with *Marks* in only a single sentence: without citation to the opinion, respondents assert that *Marks* merely "read[] the *Ybarra* decision as setting forth a clearly established rule that a search warrant must be supported by probable cause," BIO 3, a basic proposition on which respondents point out "[t]here is no disagreement," *ibid.* But *Marks* of course did much more: as the petition detailed (at 10-11) and respondents again ignore, the Ninth Circuit specifically held that *Ybarra* so clearly established that, absent individualized probable cause, an "all persons" warrant violates the Fourth Amendment that officers who execute one are not entitled to qualified immunity.

The Third and Fifth Circuits have also denied qualified immunity on materially similar facts. See *Doe* v. *Groody*, 361 F.3d 232 (CA3 2004), *cert. denied*, 125 S. Ct. 111 (2004); *Williams* v. *Kaufman County*, 352 F.3d 994 (CA5

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[2] As the petition explained, this consensus on the outcome of the Fourth Amendment inquiry is one of the factors that makes this case an especially appropriate vehicle for resolving the questions related to qualified immunity. See Pet. 27. Nor is it particularly "ironic" that petitioners identify a conflict between the Fourth Circuit and other courts of appeals and simultaneously maintain that the law was "clearly established" by *Ybarra*. Contra BIO 4. The Fourth Circuit simply misread *Ybarra*. See Pet. 16-17.

2003); Pet. 11-14. Respondents rely on the fact that in *Doe* and *Williams* – in contrast to this case and *Marks* – the search was not conducted pursuant to an "all persons" warrant. The petition (at 14) again fully anticipated this argument. The presence or absence of a warrant is immaterial to the qualified immunity determination in a case, such as this, in which the defendant-officers secure the defective warrant. At least since *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986), it has been clear that an officer cannot obtain qualified immunity if he causes a Fourth Amendment violation by presenting a magistrate with a warrant application that "a reasonably well-trained officer would have known * * * failed to establish probable cause."

Thus, if *Ybarra* clearly established that propinquity alone cannot provide probable cause – as petitioners contend and the Third, Fifth, and Ninth Circuits hold – then a reasonably well-trained officer in respondent Maldonado's position should have known that his asserted basis for an "all persons" warrant would be constitutionally insufficient. Whether he sought a warrant or not, he is liable in a Section 1983 damages action for causing a clearly unreasonable and unconstitutional search. As this Court explained last Term in *Groh* v. *Ramirez*, 124 S. Ct. 1284, 1293 (2004), when it denied qualified immunity to an officer who executed a search warrant that violated the Fourth Amendment's particularity requirement, "[i]t is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized"; "because [the officer] himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid."[3]

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[3] In a slight variation on this argument, respondents contend that "[t]he fact that the warrant was issued compels the conclusion that the law was not clearly established at that time and that the Respondents could not have reasonably known that their conduct in

II. Certiorari is Warranted to Decide the Relevance of Out-of-Circuit Authority in the Qualified Immunity Determination.

Review is furthermore warranted because the decision below exacerbates a substantial conflict over the relevance of out-of-circuit authority to the qualified immunity inquiry. Respondents offer no answer to petitioners' showing that there is a clear conflict among the circuits and that under the qualified immunity methodology employed by six other circuits the outcome in this case would have been different. See Pet. 23-26. In contrast to either *Wilson* v. *Layne*, 526 U.S. 603 (1999), or this Court's recent decision in *Brosseau* v. *Haugen*, 543 U.S. ___ (2004) (No. 03-1261), slip op. at 6, in which the plaintiffs could point to "only a handful of cases," petitioners have cited literally *dozens* of cases, including cases from three courts of appeals and at least twelve state supreme courts, that have established the unconstitutionality of "all persons" searches conducted without individualized probable cause. If out-of-circuit precedent can ever play a decisive role in determining whether the unconstitutionality of an official's act is clearly established, it must do so here. Thus, this case offers a particularly appropriate opportunity for this Court to clarify this key aspect of the qualified immunity inquiry.

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executing the warrant was unlawful." BIO 8. But a warrant cannot create probable cause where none exists: as the Fourth Amendment itself provides, "no Warrants shall issue, but upon probable cause." Cf. *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984) ("[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."). While the existence of a warrant may change the availability of particular *remedies* – for example, evidence obtained in reasonable reliance on a defective warrant can be admitted at a criminal trial, see *United States* v. *Leon*, 468 U.S. 897 (1984) – it does not obviate the unconstitutionality of the underlying conduct.

Respondents' reliance on this Court's decision in *Wilson* to supposedly disprove the conflict, see BIO 6-7, is befuddling. This Court's opinion looked not only at decisions from the Fourth Circuit and the Maryland Supreme Court (the underlying search having taken place in Maryland), but also at out-of-circuit decisions. See *Wilson*, 526 U.S. at 616. And the Court's ultimate conclusion – that the plaintiffs had not "brought to our attention any cases of controlling authority in their jurisdiction * * *, *nor have they identified a consensus of cases of persuasive authority* such that a reasonable officer could not have believed that his actions were lawful," *id.* at 617 (emphasis added) – recognized that even in the absence of intra-jurisdictional authority, out-of-jurisdiction precedent could clearly establish the law.

Inexplicably, respondents equate this Court's analysis in *Wilson* with the rule expressed by the Fourth Circuit's prior opinion in *Wilson* (which respondents describe as "the same approach taken by the Fourth Circuit in the present case," BIO 7) that out-of-circuit is *not* relevant: "The law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *Wilson* v. *Layne*, 141 F.3d 111, 114 (CA4 1998), *quoted in* BIO 7. Since this Court's decision in *Wilson* v. *Layne*, the Fourth Circuit has reiterated its rule that in "determining whether a right was clearly established at the time of the claimed violation, courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." *Wilson* v. *Kittoe*, 337 F.3d 392, 402-03 (CA4 2003) (internal quotation marks and citations omitted; bracketed material in the original).[4]

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[4] In *Jean* v. *Collins*, 155 F.3d 701, 709 (CA4 1998) (en banc), *vacated and remanded on other grounds*, 526 U.S. 1142 (1999), the Fourth Circuit aligned its presumption with "the Eleventh Circuit's longstanding practice" that "if a right is

Indeed, in their opposition, respondents continue to place heavy reliance on the absence of on-point authority from "the Fourth Circuit [and] the South Carolina appellate courts" which they describe as "the courts providing controlling authority for South Carolina." BIO 7. That approach to qualified immunity may comport with the settled view of the Eleventh Circuit, but it cannot be reconciled with this Court's decision in *Wilson* v. *Layne* or the rulings of six other circuits that do look beyond their own boundaries. See Pet. 24-26.

To be sure, the Fourth Circuit in this case paid lip service to decisions from outside the circuit. See Pet. App. 18a. But it essentially ignored the consensus position that respondents' conduct violated the Fourth Amendment and gave unwarranted weight to the *one* decision (out of more than two dozen) that would not have held respondents' conduct unconstitutional. The court of appeals granted respondents qualified immunity on the grounds that the courts which had adopted the "majority view," *id.* 11a, had articulated their views using different *verbal formulations*, see *id.* 18a, even though all those courts would have reached the same *outcome* on these facts. The petition showed that the court of appeals' rule cannot be reconciled with other circuits' holding that the relevant question is whether a consensus of out-of-circuit authority would deem the defendants' conduct unconstitutional. Pet. 25-26. As this Court recently "emphasize[d]," the qualified immunity "inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition. * * * 'The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that *his conduct* was unlawful in the situation he confronted." *Brosseau*, slip op. at 5 (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)) (emphasis added).

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recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense."

Respondents accuse petitioners of "fail[ing] to recognize that the different legal tests * * * can and do affect the ultimate outcome." BIO 7. They maintain that, "where as here the proper legal test effects [sic] the outcome, it was entirely appropriate for the court to focus on the fact that the legal test to be applied is not clearly established in determining that qualified immunity is appropriate." *Ibid.* Respondents' argument is a non-sequitur: although there might be some hypothetical case in which other courts' judgments of constitutionality might differ, respondents do not contest that in *this* case, the outcome would be the same regardless of which formulation a court used to describe its Fourth Amendment analysis.

The Fourth Circuit's standard also merits review because it will undermine this Court's central goal of encouraging "the law's elaboration from case to case," *Saucier*, 533 U.S. at 201, by deterring plaintiffs from filing Section 1983 damages suits in the Fourth Circuit even when the law is clearly established elsewhere because they will inevitably be dismissed due to qualified immunity. See Pet. 28.

III. Respondents' Arguments That This Case Is Not an Appropriate Vehicle to Decide the Questions Presented Lack Merit.

Respondents offer a barrage of suggestions as to why this case is not an appropriate vehicle for deciding the questions presented. Each of their suggestions reflects a profound misunderstanding of the framework for deciding questions of qualified immunity.

First, respondents claim that "[t]he legality of the warrant and whether probable cause exists * * * are issues remaining to be litigated," BIO 1, and that because the existence of probable cause "has not been conclusively determined, this case is not an appropriate avenue for this Court to resolve the perceived circuit conflicts cited by the [p]etitioners." BIO 2. This assertion is quite misleading. The court of appeals upheld respondents' assertion of qualified immunity; thus

there is nothing left to be litigated with respect to petitioners' Fourth Amendment claims. The fact that petitioners can still pursue "state law claims that were remanded by the district court to state court," *ibid.*, is simply beside the point, because their federal constitutional claims have been finally resolved by the decisions below.

Much of respondents' brief in opposition is taken up with factual assertions designed to establish that the searches in this case were in fact constitutional. See, *e.g.*, BIO 2 (suggesting there may have been additional, oral information before the issuing magistrate); *id.* at 8 (suggesting facts about the relationship between each of the persons to be searched and the premises). But whether, on respondents' version of contested facts, the search complied with the Constitution is irrelevant at this stage of the proceedings. As this Court has repeatedly stated, because qualified immunity is "an immunity from suit rather than a mere defense to liability," *Saucier*, 533 U.S. at 200 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)), and must be decided early in the course of litigation, a court facing an assertion of qualified immunity "must ask first the following question: '*Taken in the light most favorable to the party asserting the injury*, do the facts alleged show the officer's conduct violated a constitutional right?'" *Brosseau*, slip op. at 4 (quoting *Saucier*, 533 U.S. at 201). Each of the courts below held that, using that standard, petitioners had shown a constitutional violation. That was why they reached the question of qualified immunity.[5]

Respondents also offer an alternative ground for concluding that their conduct complied with the Fourth Amendment: the searches in this case were supposedly "frisk

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[5] To be sure, if this Court were to reverse the grant of qualified immunity, it would be open to respondents on remand, in litigating the merits of petitioners' Fourth Amendment claims, to offer additional evidence to show that the search in this case was in fact constitutional.

searches in execution of the search warrant [that] were constitutionally permitted for purposes of ensuring officer safety." BIO 2. But that claim also requires accepting respondents' version of contested facts: petitioners have alleged that they were subject to intrusive evidentiary strip searches, rather than protective searches. See Pet. 4; Pet. App. 3a. Under petitioners' version of the facts, this case thus differs materially from *State* v. *Guy*, 492 N.W.2d 311 (1992), *cert. denied*, 509 U.S. 914 (1993).

Second, respondents contend that "this [Section 1983 action] – as opposed to a criminal case – is not in the best posture" in which to engage in "further analysis of the *Ybarra* decision." BIO 5. That argument, of course, ignores the fact that no criminal case can present the important and recurring questions of qualified immunity raised by this petition. Moreover, respondents' suggestion would produce a perverse result: it would provide an exclusionary remedy to criminal defendants who have been subjected to unconstitutional searches that produced incriminating evidence while completely denying any remedy to entirely innocent individuals, such as petitioners, against whom no evidence was ever obtained. The idea that suppression motions in criminal prosecutions, rather than damages actions by entirely innocent individuals, are the preferred form of enforcing the Fourth Amendment has been rejected by this Court. See *Malley*, 475 U.S. at 334 (referring to "the person who in fact has done no wrong" as "the victim of police misconduct one would think most deserving of a remedy"). Given the overwhelming consensus in the case law that respondents' conduct violated the Fourth Amendment, petitioners should be entitled to seek redress.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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